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ON

THE HINDU JUDICIAL SYSTEM

DELIVERED BY

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PREFACE

I am grateful to Dr. Radha Kumud Mookerji and to the authorities of the Lucknow University for having honoured me with the invitation to inaugurate the Radha Kumud Mookerji Endowment Lectures. The subject of these lectures was suggested by Dr. Mookerji himself. Some account of Hindu Judicature and adjective law can be read in several available books (Guru Raja Ṙao, *Ancient Hindu Judicature ;* Ganganath Jha, *Hindu Law in its Sources ;* Gharpure, *Hindu Law Texts*—general introduction ; Jolly, *Hindu Law and Custom ;* Jayaswal, *Manu and Yagnavalkhya ;* P.N. Sen, *Hindu Jurisprudence ;* Radha Kumud Mookerji, *Local Government in Ancient India ;* R. C. Mazumdar, *Corporate Life in Ancient India ;* P. N. Banerji, *Public Administration in Ancient India* and V. R. Dikshitar's books). So long ago as 1828, Mr. Colebrooke gave a summary and a translation of the relevant passages from the Smritis and the commentaries. . . (see his Miscellaneous essays, Vol. II, p. 490). I nevertheless accepted the subject suggested by Dr. Mookerji because I shared the feeling expressed by Mr. Jayaswal that the Hindu Law of Procedure is well worth a critical study which will repay the student of comparative jurisprudence . . (introduction to his *Manu and Yagnavalkhya*, p. xxii). I have accordingly laid stress on comparative

and historical study instead of contenting myself with a descriptive account. With this purpose, I have much more frequently referred to the history and to the rules of the Roman and the early English Law, the Canon Law and other foreign systems than I should otherwise have deemed necessary. As the course was not expected to exceed four or five lectures, I have dealt with the subject only in its broad outlines.

No useful purpose will be served by yielding to the temptation to antedate the emergence of modern ideas and institutions. Our critics, on the other hand, have sometimes judged the institutions of Ancient India by the standard of nineteenth century ideals and institutions. This is both futile and unjustifiable. Herbert Spencer is said to have observed that Sir Henry Maine was himself not free from "the lofty contempt for barbarous systems which he condemned in others". Clear indications of this attitude will be found in several of Maine's criticisms on Hindu Law and Hindu Institutions. It now seems to be more generally recognised that a sympathetic understanding of the oriental point of view is necessary to overcome the narrow prejudice and hasty judgment which would give an entirely erroneous idea of the relative position and value of a system of law applied under conditions different from those which surround the observer,

(see Preface to Vol. III of *The Evolution of Law*, selections compiled by Kocourek and Wigmore). Indians must however recognise that for expressions of condescension and sneer found in the writings of western historians and jurists, we are ourselves partly responsible. While foreign jurists, in spite of their many disadvantages, have, out of a spirit of research, directed their attention to Hindu Law, no matter with what success, we ourselves have simply looked on. (Sens *Hindu Jurisprudence*, *p.* 110.).

January, 1946. S. VARADACHARIAR.

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LIST OF ABBREVIATIONS

Work	Abbreviation
Altekar, Dr. Village Communities in Western India ..	V.C.W.I.
Beal, Buddhist Records ..	Beal.
Brihaspati ..	Brih.
Cambridge History of India ..	Camb. H.I.
Das, A. C., Rig Vedic Culture ..	Das.
Dharma Kosa ..	Dh. K.
Garpure, General Introduction to the Hindu Law Texts ..	Gharp.
Holdsworth, Sir W., History of the English Law ..	H.E.L.
Jayaswal, K.P., Manu and Yagnavalkhya ..	M. & Y.
Jha, Dr. Ganganath, Hindu Law in its Sources ..	Jha.
Jollowiez, Historical Introduction to Roman Law ..	Jol.
Kane, Mahamahopadhyaya, History of the Dharmasastras ..	Kane.
Kane, Edition of Katyayana ..	Kat.
Lee, Historical Jurisprudence ..	Hist. Jur.
Macdonell and Keith, Vedic Index ..	V. I.
Mahalingam, Administration and social life under Vijayanagar ..	Vij.
Maine, Sir Henry, Ancient Law ..	Anc. L.
,, Early History of Institutions ..	E.H.
,, Early Law and Custom ..	E.L.
Majumdar, Dr. R. C., Corporate Life in Ancient India ..	Maj.
Manu ..	M.
Monahan, Early History of Lower Bengal ..	L.B.
Mookerjee, Dr. Radha Kumud, Local Government in Ancient India ..	L.G.

Narada (according to Jolly's arrangement) ..	Nar.
Pollock and Maitland, History of the English Law ..	P. & M.
Rahim, Sir Abdur, Muhammadan Jurisprudence ..	M. J.
Robson, Civilisation and the Growth of Law..	Rob.
Sacred Books of the East ..	S.B.E.
Spencer, Herbert, Political Institutions ..	Herb. Sp.
Strachan—Davidson, Problems of the Roman Criminal Law ..	Str. Dav.
Vinogradoff, Sir, Paul, Collected Papers ..	Vin. Col. P.
Historical Jurisprudence ..	Vin. Hist. Jur.
Yagnavalkya ..	Yag.

THE
HINDU JUDICIAL SYSTEM.

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1. Scope and Lines of Study.

I do not propose to attempt a definition of the word 'Hindu' in the title of these lectures; but I may state that a study of the Hindu Judicial System, to be adequate and fruitful, requires a treatment of the subject under three heads :—

(*a*) The system as described in the Hindu Law Books;

(*b*) The system as it obtained in ancient and mediæval India, during what has been called the "Hindu Period" in Indian History; and

(*c*) The system as it was practised in some of the leading Hindu States, before they came under the influence of foreign ideas and methods.

This threefold division may involve some overlapping; but a discussion on these lines will help to explain aspects which may not be clearly brought out if we limit ourselves to a study of the system as developed in the Law Books. Further, the study, to be useful, must also be comparative. It has sometimes been suggested that the Dharma Sastras merely outlined some kind of ideal system and cannot be taken to describe a system that was actually in operation. A study under the second

and the third of the above heads may help to answer this criticism ; but such study is even now handicapped by the lack of adequate materials. It will of course be necessary to consider how far the internal evidence afforded by the Law books themselves refutes such criticism.

The study may be conveniently sub-divided on chronological lines, somewhat as follows :—

(i) The Vedic or Pre-Sutra period ;
(ii) The Sutra Period ; } spoken of together as the Dharma-Sastra age ;
(iii) The Smriti Period ; }
(iv) The Post-Smriti Period.

Without anticipating what I may have to say on the point of chronology, it may be generally stated here that, according to the opinion of modern historians, the first period will bring us down to about the seventh or sixth century B.C., the second will cover a period of about three or four centuries coming down to sometime near the establishment of the Mauryan Empire and the third may be taken to extend to the fourth or fifth century A.D. thus covering a period of seven or eight centuries. The fourth division will be represented by the period of the Commentaries and the Nibandha Granthas, the leading commentaries being those of Asahaya (seventh century A.D.) on Narada, of Visvarupa (eighth century A.D.) on Yagnavalkya, of Medhatithi (ninth century) on Manu and of Vignaneswara (eleventh century) and Apararka (twelfth century) on Yagnavalkya. The Nibandhas began with the Kalpataru and the works of Jimutavahana in the eleventh or twelfth century and continued to appear till about the middle of

the seventeenth century, in different parts of the country. It is scarcely necessary to say that Law and Procedure could not, even in a stagnant country, have been static during such long periods. The late Dr. Priyanath Sen' rightly observed that the critic who pretended to see nothing in the Hindu Law but a stagnant mass of archaic rules knew not what he said and only showed that he himself had a stagnant mind. It will be instructive to compare the provisions of the several Sutras and Smritis from this point of view.

2. Political History of the Relevant Period.

We have as yet little knowledge of or materials for the History of India prior to the seventh or sixth century B.C. There has been great diversity of opinion amongst scholars as to the dates of some of the leading incidents in early Indian History—the margin of difference sometimes extending to centuries. Mr. Vincent Smith states that about the middle of the seventh century B.C., the settled country between the Himalayas and the Narmada was divided into a multitude of independent states, some monarchies and the rest tribal republics, secluded from the outer world and free to fight among themselves. The earliest dynasty which, according to him, can claim historical reality, was the Saisunaga, of which Bimbisara was the fifth in the line of kings. Mr. Smith would take 528 B.C. as the probable date of his accession to power. By conquest and by marriage, he managed to acquire a large kingdom to rule over, including Maghadha and the Angadesa. The Buddha and Mahavira (the founder of Jainism) were preaching

in Magadha about this time. Bimbisara's son Ajatasatru conquered the Kosala country and the land of the Lichhavis. The Nanda dynasty (reputed to be Sudras) came to power about 371 B.C. Towards the close of the fourth century B.C., Chandragupta, the founder of the Mauryan dynasty, defeated the last of the Nanda kings and led the Hindu revolt in North-west India against Alexander's successors. Henceforth, the history of India, so far as the Hindustan is concerned, may be said to be less obscure. Bindusara and Asoka, the successors of Chandragupta, extended the limits of the Mauryan Empire, to the mouth of the Ganges in Bengal, to Nepal and Kashmir in the north and north-west, up to Afghanistan, Baluchistan and Sind in the West, and far enough in the south to include parts of the Madras presidency and Mysore. The nature of this and other similar Empires of Ancient India I shall describe later.

The Mauryans were succeeded by the Sunga dynasty (about 180 B.C., according to Mr. Smith) though their territories were much smaller in extent. This dynasty is associated by some writers with the commencement of the Brahminical reaction which is said to have driven Buddhism out of India. The next dynasty of any importance to rule over Magadha was the Andhra or Satavahana dynasty, whose rulers are said to have come into prominence shortly before the commencement of the Christian Era though (according to one view) they had already been ruling over the Andhra country. The next landmark is the rise of the Gupta Empire, assigned to the beginning of the fourth century A.D. Samudragupta who is said to have reigned from

326 to 375 A.D. was perhaps the most brilliant of the Gupta Emperors. His conquests included Hindustan up to the Jumna and the Chambal in the west, and portions of the Mahratta country and of the Madras Presidency. His son Chandragupta II, also known as Vikramaditya, extended the limits of the Empire so as to include Kathiawad and Malwa. Though the dynasty continued up to the eighth century A.D., its importance began to decline after the middle of the fifth century, its rulers holding sway thereafter only over some of the eastern provinces or only over Magadha. This dynasty is associated with the best days of Sanskrit learning and the re-establishment of the Brahminical religion. By the end of the Gupta period, says Mr. Smith, the course of Buddhism on Indian soil had been nearly spent, though both Buddhism and Jainism continued to receive encouragement in certain parts of the country. The next attempt at some kind of Empire-building was that made by Harshavardhana at the beginning of the seventh century A.D. With his death (647 A.D.), 'the Ancient period' of Indian History as well as the days of attempts at imperial rule by Hindu kings in Hindustan may be said to have come to an end. For some centuries thereafter, Hindustan consisted of a number of petty States often arrayed in hostile camps. Tolerably efficient administration by Hindu dynasties continued in the Deccan down to the beginning of the twelfth century A.D. and to about much the same time in South India.

Whatever might have been the original course of Aryan settlement in India, the Trans-Indus areas scarcely formed part of Hindu India during

historical times. Even the area between the Indus and the Jumna was frequently under Non-Aryan occupation. The definitions, in the Smritis, of the terms Aryavarta, Madhyadesa, Brahmadesa, Brahmarshidesa, Mlechhadesa, and Bharatavarsha are significant to indicate the eastward and south-eastward progress of the Aryans. (See *Kane*, II, pp. 11, etc. ; *M & Y*, pp. 29, 30 and 64). The territory between the Jumna and the Ganges passed under Muslim rule during the twelfth century and Bengal and Bihar were conquered by the Afghan rulers by the end of the twelfth or the commencement of the thirteenth century. The turn of the Deccan came next ; and, though South India did not substantially pass under Muslim rule, Hindu administration even in that part of the country became disorganised by the invasion of Malik-Kafur early in the fourteenth century. The Vijayanagar and Mahratta empires were attempts to revive Hindu rule in the Deccan and Central India, in parts of South India and on the west-coast of the Peninsula. Even in the areas that had been conquered by the Muslims, Hindu administration seems to have subsisted here and there and now and then (especially in Bengal and Bihar) either in some kind of subordination to Muslim suzerainty or during periods of weakness of the Muslim rule. Some of the later Nibandha Granthas of the Hindu Law were compiled by persons patronised by or employed under such Hindu rulers. Some description of the Administration of Justice in the Vijayanagar and Mahratta empires will fall under the third of the heads which I have indicated at the outset.

3. The Aryan Element in the Legal Institutions of India.

Questions have been raised as to whether some of the dynasties that ruled in Hindustan, in Central India and in the Deccan, during the ancient or mediæval period and the Pallavas who ruled for sometime over large tracts in South India were of Aryan extraction at all. In South India, the Cholas and the Pandyas were of Dravidian origin. There can however be little doubt that in the hey-day of their power, all these dynasties aspired to be and were in fact recognised as Hindus and they attempted to make their administration conform, as far as possible, to the pattern obtaining in the undoubted Aryan states of Hindustan. Diverse theories have been put forward as to the origin of the Rajputs. According to one view, they were the descendants of the Sakas or Scythians who came to India about the sixth century A. D. Some of the internecine wars of North India during the mediæval period have been described as a struggle between the foreign Rajputs of the North and the indigenous Rajputs of the South. To quote Mr. Smith, " the Rajputs formed by the social promotions of aborigines were inimical to the Rajputs descended from Barbarian immigrants". People of the most diverse races are said to have been lumped together as Rajputs, if only they followed the Hindu rituals and were actually engaged in the work of government. The story of the Agni-kula origin of some clans has been interpreted as referring to some ceremony whereby the impurity of their foreign descent was removed and they became fitted to enter the caste system. But it

seems to be agreed that the Rajput dynasties found it advantageous to adopt the Brahminical faith and it has been said that this accession of strength enabled Hinduism ultimately to succeed in the struggle with Buddhism and Jainism. A writer remarks : 'The Genius of the Rajput age was against the principles of Buddhism and the Brahmins stimulated the martial spirit of the Rajputs by connecting them with the great Kshatriya traditions of the past'.

4. Background to the study.

The growth of law and justice is closely connected in its several stages with the prevailing form of social and political organisation. Some kind of social structure must have preceded political organisation. In the words of Herbert Spencer, political organisation is that part of the social organisation which consciously carries on directive or restraining functions for public ends. But the Austinian view that there can be no law before the emergence of the State is no longer generally accepted. It is now recognised that in primitive societies, where sanction in the Austinian sense was unknown, the sanction provided by social machinery was effective enough in practice. Describing the constitution of Iceland in the tenth century, Viscount Bryce (in his *Studies in History and Jurisprudence*) observes 'the Iceland republic was a government developed only on its judicial side. We find law and indeed a complex and highly developed legal system existing without the institutions which make a State. Far from the State creating the law, it is the law that created the

State. The decision of the Court had to be put into effect by the successful plaintiff. There was no enforcement by public authority. The sanction was furnished partly by public opinion and partly by the insecurity attaching to the life of the person who disregarded a judgment and thus became an outlaw.' These observations deserve to be borne in mind when studying the early history of the Hindu legal and judicial system.

Social development may be said to fall into three stages :—(i) Tribal society organised on the basis of kinship-groups at the one end ; (ii) National society organised on the basis of territorial groups at the other end and (iii) a transition stage, long or short between the two. The essential unity of human nature may lead to the existence of a similarity of institutions among different peoples ; but, as insisted on by Maitland, it will be erroneous to assume that all communities pass or must pass through approximately the same stages of evolution. 'Races and Nations do not travel by the same roads and at the same rate.'

The felt necessities of the time and the prevalent moral and political theories determine the lines of development of the law. "The law of every country is the outcome and result of the economic and social conditions of that country as well as the expression of its intellectual capacity for dealing with these conditions." (Bryce). The relevant intellectual ideas include ideas in respect of the relation of man to God and of man to man and as to the aim and purpose of life on earth. 'Hence it is that during periods when the idea of a life beyond the grave was in control, all things in this life were

conducted or expected to be conducted with reference to the next ; and social theories and institutions were tested with reference to their harmony to this idea. (Bury, *The Idea of Progress.*) The following comment by Stephen Leacock (in *Too Much College*) on the system of education in vogue in England and on the Continent during the fourteenth and fifteenth centuries is interesting. The older ideal of education (according to him) was 'to teach people how to die and keep out of hell ; the supreme purpose of it all was salvation* * Law in England struggled long before it shook off the hand of ghostly guidance.' For a correct understanding and appreciation of the Hindu Judicial System, it is therefore necessary to take note of (i) the social condition and sociological theories of ancient India, (ii) its political condition and political philosophy and (iii) its religion and religious philosophy.

5. The Social and Sociological Background.

There is great divergence of views amongst scholars as to the commencement of the Aryan settlement in India—what may be called The Rigvedic Age (See *The Rigvedic Culture by* A.C. Das). There is however little difference between Mr. Das and Messrs. Macdonell and Keith (*Vedic Index*) as to the result of the information gatherable from the Rigveda in respect of the social and political conditions in which the early Aryan settlors lived. Their life was pastoral—agricultural and therefore rural. The wide dispersion in space which the needs of a rural economy required is in contrast with the tendency of people who are commercially occupied to gather together in cities.

This circumstance determined that the course of social and political life in India must be different from that of the City States of Greece and Rome. There is reason to think that the Mohenjadoro civilization was markedly urban. But whether it was Aryan or not, it does not seem to have materially influenced Aryan life in India. From the earliest times, life in India has been so organised on the basis of the autonomous village that village institutions were not only recognised by the later Dharmasastra literature but were strong enough to defy and survive all the political vicissitudes of the country, till recent times. For a detailed study of these institutions, reference may be made to Dr. R. C. Majumdar's book on *Corporate Life in Ancient India*, Dr. Radhakumud Mukerjee's book on *Local Government in Ancient India* and Dr. Altekar's book on *Village Communities in Western India.* The ancient village organisation was more or less a natural development and not a creation by a Central Government—indeed, it preceded any form of Central Government. The people were composed of tribes (Janas) ; the territory in which a group of villages possessing a common tie was situated came to be known as a Janapada. The Gotra was an aggregate of a number of families (Kulas) and the Goshti an aggregate of a number of Gotras. A number of Goshtis together formed a Grama and the head of the village was the Gramani, generally a Vysya in early times. *Pur* represented a fort or stronghold ; but it does not appear that there was much city life during Vedic times. The Gramani of the village or city where the royal residence was situated was naturally influential and

was specially honoured. The Gramani represented the people before the ruler and the ruler to the people. It is possible that he was sometimes elected by the people and sometimes nominated by the King. When the office became hereditary—as was the practice with many offices in this country—the Gramani was in some measure independent both of the ruler and of the people. The Manusmriti and the Arthasastra advise the King to encourage the formation of villages, to group them into divisions and to appoint proper officers for them ; but they do not use the term Gramani (Gramika is the term used by Kautilya and Manu). According to *Manu*, VII. 118, the Gramika would be entitled to receive all the allowances *in kind* (food, drink, fuel, etc.) which the King would be entitled to receive from the villagers *everyday*. A distinction is drawn between the daily dues and the annual dues ; the latter must go to the King. Kautilya preferred remunerating all officers by a salary system.

6. The Assemblies and Other Group Authorities.

Government by a primary assembly composed of the adult males of the village was the central feature of rural organisation. These assemblies derived their authority from ancient custom or Dharma. In the Vedic and Smriti literature, we come across a variety of bodies as to whose composition, powers and functions, there have been differences of opinion (See *Muk. L. G.*, pp. 29, etc.). But as insisted on by Mr. Jayaswal and by Dr. Radhakumud Mukerjee, they all represent more or less democractic ways of managing and directing

the affairs of the people. [Dr. Altekar thinks that in certain parts of the country, village administration must have become less democratic during the period of the Brahmanas than it was during the Rig Vedic period. (*V.C.W.* I. Intro.)]. It is not unlikely—and this consideration if borne in mind may help to narrow the points on which writers differ—that the nomenclature, composition and function of some of these bodies varied from time to time and place to place. Further, a body may theoretically include all adult males but it is natural that only persons with sufficient leisure or men of sufficient capacity to deal with the matter on hand (often spoken of as the elders of the village) will ordinarily attend. With the development of different sides of economic activity, associations formed on the basis of common economic pursuits, like the Guilds of the West, seem also to have come into existence. They will naturally comprise only those that are concerned with each economic activity. It is also not improbable that a body when exercising one kind of function—social, political or judicial—may be known by one name and when exercising another kind of function may be known by another name.

Among the bodies whose names occur in Vedic literature, three may be specially mentioned, *Parishad*, *Samiti* and *Sabha*. The authors of the Vedic Index say that in the Upanishads, *Parishad* denotes an assembly of advisers on questions of philosophy. But, in later literature, the word denotes not only a body of advisers on religious topics but also the assessors of a Judge or the council of Ministers of a Prince. There has been

difference of opinion as to whether Samiti and Sabha meant the same thing or not. Macdonell and Keith say 'It is reasonable to assume that the business of the Samiti was general deliberation on policy of all kinds, legislation, (so far as the Vedic Indians cared to legislate) and also Judicial work.' They doubt whether even in the Samiti 'much attention was paid to the views of the common man.' The Sabha, was in their opinion, an assembly of Brahmins and rich patrons ; it was a kind of village council. It must have met frequently for the administration of justice. *Sabhasad* was a technical description of the assessors who decided legal cases in the assembly. The Vedic commentator Sayana takes Sabha to be an assembly of learned men and the Samiti to be an assembly of fighting men (*Dh. K.* I., 22). According to Mr. Das, the Samiti was the popular assembly which could be attended by all, irrespective of rank, class or wealth. He adds 'the Samitis must have been convened on special and important occasions, the Ṣabhas were probably local and permanent institutions.' Dr. Majumdar thinks that the Samiti was the central assembly while the Sabha was the local assembly. Mr. Jayaswal was of the opinion that the Samiti was a national assembly of the whole people, a sovereign body electing the king and discussing matters of state. The Sabha, he thinks, was perhaps a standing body of select men under the authority of the Samiti and it was the national Judicature. The Samiti does not appear to have survived the Vedic period. The Sabha became the main judicial institution in the scheme of the Dharma Sastras, (for another version, see *Camb. H. I.* I, pages 96 and

133). Bodies like the Paura, Janapada, etc., of the post-vedic times need not detain us, because whatever their political importance, they seem to have had no connection with the judicial system. In the Sutras and Smritis, we come across a number of other bodies ; such as Kula, Gana, Vrata, Puga, Sreni, etc. ; Gana and Vrata are referred to even in a Vedic passage. (*Dh. K.* I, 21). It will be convenient to deal with these bodies when describing the judicial tribunals of the land.

7. Classes and Castes.

Class distinctions date back to the beginnings of social life (Herbert Spencer). Societies formed by conquerors are frequently composed of two societies, the conquerors and the conquered. We cannot expect to find in a rule established by invaders the same traits as in a rule that has grown up from within. It has been pointed out by Macdonell and Keith that in the Vedic period, 'Arya' meant the three upper classes and that it stood in contra-distinction to the Dasa and the Sudra. There is difference of opinion (they say) as to whether the Aryans were themselves agriculturists or they were only a landholding aristocracy, the lands being occupied by the conquered people. 'The contrast which the Vedic Aryans felt as existing between themselves and the conquered population and which probably rested originally on the difference of colour tended to accentuate the natural distinctions of birth, occupation and locality." In its origin, the distinction differs but little from what is known to have existed amongst other early people, *e.g.*, between the Patricians and the

Plebians in Rome, between special groups of Athenians and the rest of the population in Greece, between Nobilis and Ingenui among the Germans and between Eorls and Ceorls among the Anglo-Saxons. In some countries, these differences later became matters of difference in political or civic rights and privileges. Elsewhere, they developed into differences of right to hold land ; in India, by reason of its religion and philosophy—especially (i) the theory of Gunas expounded in the Gita as disposing the Sarira (human body) in certain directions and (ii) the doctrines of Karma and Transmigration which attributed births in particular situations to one's karma in former existence —the distinction developed into the caste system. (For another theory as to the evolution of caste, see *Maj.*, pp. 143, etc.)

Hindu sociologists seem to have believed in what may be called the *organic* theory of society. Each section of the community had its allotted place and function and each was as important as the rest for the achievement of the common welfare. The individualistic or the competitive principle had little operation. That the system was not without its parallel is shown by the following description of the outlook in mediæval Europe :— ' Thomas Aquinas held that Christian theology was faced with the problem of explaining God's arrangement of society. From the spiritual point of view, there was no difficulty in assigning to each man and to each class or group a position higher or lower in the scale of existence and in demanding from every one that he should be satisfied with his lot and true to his duties, that he should fulfil the task assigned

to his caste and status by Providence. A slave, a villein, a poor labourer has the same chance of achieving salvation as the descendant of a great house or the owner of a large estate. In this way, the Church accepted all conditions. Attention was directed towards the life beyond the grave and the conditions of earthly existence were simply treated as a course of preparation and instruction.' (Vin. Col. P., II, 457). The Church of England catechism still retains the answer of every member 'to do my duty in that state of life unto which it shall please God to call me.' To those who dwell on the iniquity of having different rules of law for different sections of the community, I would commend the following observations of Sir W. Holdsworth—'That different classes of society should be governed by different laws would have appeared a truism to the mediæval legislator. In the middle ages, difference in legal rules was conceived of as depending not upon the fact that difference in pursuit and calling makes some deviation from the rule of similar and equal law a necessity, but rather upon the necessary and natural differences in the structure of society. * * * As late as Henry the Eighth's reign, this mediæval point of view was advocated as making for the peace and order of the state' (H.E.L. II, 464).

The institution of caste undoubtedly permeates the law and the judicial system of the Smritis. Later on, I shall refer to some of the privileges and immunities allowed to Brahmins by the ancient Criminal Law. Another instance was the rule exempting the property of a *Srotriya* (learned Brahmin practising the prescribed austerities of

his order) from the extinctive operation of the lapse of time (M. VIII. 149 Yag., II. 25). The reason for this exemption and the like exemption in the case of property belonging to the King and to women is thus explained by Vignaneswara —" By reason of the fact that the King must be busily engaged over his numerous public concerns, of the ignorance and want of capacity of women, and in the case of the Brahmin, by reason of his being busy with Adhyayana and Adhyapana with the discussion of the meaning of the Texts and with the ritualistic practices incidental to his status" :

राज्ञो बहुकार्य व्याकुलत्वात् स्त्रीणामज्ञानादप्रागल्भ्याच्च श्रोत्रियस्याध्ययनाध्यापन तदर्थ विचारानुष्ठान व्याकुलत्वात्.

A Brahmin (at any rate, a Srotriya) could not be compelled to come as a witness, unless he had attested a document. Narada (IV, 158) is against his being asked to be a witness at all. He does not assign any reason for this, but the Bhashya explained the reason to be that they were always expected to be engaged in the performance of good deeds and that there should be no interruption thereto.

नित्यं तेषां साधुनिकर्मणि प्रवृत्तत्वात्तदुपरोधो । मा भूदिति.

Nevertheless judicial tribunals were expected to be mainly composed of Brahmins and Sudras were expressly excluded from them.

I must here observe that one's condemnation of the caste system as it exists today ought not to make one blind to the inevitableness, if not the

appropriateness, of some at least of the features of the system in the early Hindu period. Of the classes composing the Aryan community, the Vysyas seem to have deteriorated in course of time. They represented that portion of the community which engaged itself in agriculture, industry and commerce. They did not care to avail themselves of the privilege of studying the Vedas and they seem to have taken little part in the intellectual life of the day. In the Arthasastra, the same occupations are prescribed for the Vysya and for the Sudra. In the language of the Vedic Index, 'The Brahmins represented the intellectual side of Vedic life and Kshatriyas, if they played a part in that life, did so only to a secondary degree and to a minor extent.' Their occupation as warriors and their association with the ruling class however gave the Kshatriyas a special status. In view of the conflict arising or likely to arise out of claims of superiority between these two sections of the community, even the Vedic Texts insisted that the union of the Kshatriya and the Brahmin was essential for complete prosperity. The fact of the struggle is attested by Buddhist Texts (Maj. 161). The need for unity between them was again emphasised by Manu and Kautilya. The Mahabharata (Santiparva) stated 'Brahmins (or the Brahmin spirit) and Kshatriyas (or the Kshatriya spirit) are the basis of the whole society. The Brahmin helps the Kshatriya to grow and the Kshatriya likewise helps the Brahmins.'

ब्रह्म क्षत्रंहि सर्वासां प्रजानां मूलमुच्यते।
ब्रह्म वर्धयतिक्षत्रं क्षत्रतो ब्रह्मवर्धते ॥

The story of the contest between Vasishta and Visvamitra has been variously interpreted (see Mr. Ranade's Essay under that title and the theory put forward by Mr. Shama Sastri in his *Evolution of Indian Polity*, p. 73) ; it certainly implies conflict and reconciliation between the two communities. The resulting co-operation between the Brahmins and the Kshatriyas precluded the emergence of any conflict between the temporal power and the spiritual power as in Europe. The following observation of Sir Henry Maine is much too biassed to be accepted as correct ; He says ' the impression left on my mind by the study of these books is that a more awful tyranny never existed than this which proceeded from the union of physical and intellectual and spiritual ascendency.'

It is doubtful if the Sudras ever formed a single caste. The term ' Sudra ' probably covered numerous inferior races and tribes defeated by the Aryan invaders. It is however probable that in course of time men of Aryan descent also came to be included among Sudras. (V.I. 265). While in sacred matters and in respect of the study of the Vedas and some of the Vedangas, the distinction between Vysya and Sudra continued, the occupations open to Sudras differed but little even in the Sutra period from those permitted to Vysyas. Inter-marriages of the Anuloma type were permitted between the several classes for many centuries. Even in early times, some of the King's ministers seem to have been Sudras. Commenting on the first verse in Ch. II of Yagnavalkya, the Mitakshara says "The use of the word *Nripa* shows that the administration of Justice is not the

Dharma only of the Kshatriya but of others too, if they have the power and the responsibility of governing people ".

नृप इति नक्षत्रियमात्रस्यायं धर्मः किं तु प्रजापालनाधिकृतस्य अन्यस्यापीति दर्शयति ।

Winding up the portion relating to Rajadharma in the previous chapter, the author has observed " though the duties of kings have been declared with reference to Rajahs (meaning Kshatriyas) it must be taken that this is the Dharma even of the members of other communities engaged in the administration of Vishaya (country) Mandala (Province), etc."

यद्यपि राजानमधिकृत्य राजधर्म कलाप उक्तः तथापि वर्णान्तरस्यापि विषयमण्डलादि परिपालनाधि कृतस्यायं धर्मो वेदितव्यः ॥

These passages show that even the orthodox were prepared to recognise the status and privileges pertaining to 'Authority' (*e.g.*, Provincial or District Governors) though the incumbent may not be a Kshatriya. Whether under the influence of Buddhism or as a process of adjustment and absorption characteristic of Hinduism, the gulf between the Arya and the Sudra was becoming narrower. The social inequality if any implied in the system does not appear to have led to ill-will or heart-burning, so long as it did not involve disparity in material advantages ; if anything, the Brahmin was made to depend upon the rest of the community for all material rewards. The change of conditions arising from the impact of the West and from new methods of education and public administration have changed the outlook on this subject.

8. Hindu Political Theory and Practice.

In the Vedic period, the States (so far as they could be so called) seem to have been small. Mr. Jayaswal thinks that monarchy must have been more common in the early Vedic period and republics in the later Vedic period. Macdonell and Keith say that the mere patriarchal organisation of the society was not sufficient to explain the Vedic Kingship ; it was probably a feature of the time when the Aryans came into India as invaders. It was not unlikely that Kingship was in the main elective at that stage, and when settled times came, more and more States became Republics. Republics seem to have existed in some number during the times of Panini, of Kautilya of the invasion of Alexander and of the visit of Megasthenes. They seem to have declined partly as the result of the foreign invasions of India and partly as the result of the growth of Empires, like the Mauryan and the Gupta. (Maj. pp. 87, etc.). Mr. Jayaswal points out that even in the republics, the President bore the title of 'Rajan'. Mr. Shama Sastri would describe the Vedic state as consisting of (i) a King, elected at first and hereditary later, (ii) a priestly Aristocracy, independent of the King and exempt from tolls and taxes, and (iii) a State Assembly consisting of Priests, Nobles, and the common people. (*Evolution of Indian Polity*, page 98).

Hindu political speculation reveals as concurrent lines, traces of the divine origin of Kingship, and of something in the nature of a social compact. Mr. Jayaswal and Mr. Shama Sastri think that it was the Brahmins of the Restoration period that

developed the theory of the Divine Origin of Kingship. But it generally happens (as with Hobbes and Locke) that political theories are expounded to explain or justify a state of facts that has already come into existence. It was stated in the Sastras that it was God that created Danda (the principle of coercive authority or sanction) and he also created the King to wield the Danda. The Hindu theory is however very different from the Divine Right theory of the West. Here, the King was as much subject to the law as the citizen. He could not make or alter the law (because it was assumed to be of Divine origin) ; he could only *enforce* the law. Mr. Jayaswal thinks that the position of the Mauryan Emperors was stronger, and he even suggests that Kautilya's Arthasastra must have been something in the nature of a code promulgated by them. There does not appear to be sufficient basis for this second assumption ; he would seem to read too much into the expression 'Rajasasana' (to which I shall refer later) found in a verse in the Arthasastra. He recognises however that Hindu Kingship was generally little more than a constitutional monarchy—though the limitations might not have been of the same kind as in modern constitutions—a constitution in which both the democratic and the monarchic principles found recognition. Speaking of Kautilya's Arthasastra, Mr. Monohan states 'The picture which the work presents is that of a paternal government tempered by respect for religion and custom and probably limited also by the power and privileges of Guilds and Corporations. Though the government was not democractic, it is likely that the life of the

Guilds and other associations may have afforded occasion for such democratic processes as elections, debates and decisions by majority vote.' (L.B. 137)

9. Absence of strong central Government.

Neither the Republics nor the Monarchies nor even the Empires developed a strong and comprehensive central administration ; and this accounts for the permanence of the popular element in the Hindu judicial system. By reason of the vastness of the size of the country and of other geographical features, not to speak of the accidents of history, the History of India (before the Moghul period at any rate), has been but the history of different kingdoms, different regions and different peoples. Neither during the days of the Epics nor even according to the Arthasastra does political theory or practice seem to have advanced to the conception of territorial sovereignty. States are generally referred to by the names of peoples. Mr. Jayaswal thinks that from the seventh century B.C., a tendency to develop what may be called non-National territorial monarchies is noticeable. But the tendency, if any, did not proceed far. The great empires of Hindustan and of South India enjoyed a measure of magnificence but not much solidarity. The Magadha Imperialism was probably the most centralised. Centralisation was however not easy in the circumstances of the country, with its lack of communications. One author even goes the length of asserting that centralisation seems to have been repugnant to the genius of the Race. The nature of imperial authority depended far too much on the individuality of the ruler for the time being. Imperial

sway meant little more than overlordship or the rule of the Emperor over other kings. The subjugated states retained their individuality and the old dynasties were generally continued. The Arthasastra advised caution in this respect ; but the Dharma Sastras strongly advised that course. The State was thus more feudal than unitary. Under weak kings, Provincial Governors practically exercised Royal Powers. Quoting Rapson's *Ancient India* and the *Cambridge History*, Mr. Monohan observes that the ' Maurya Empire was probably a confederation of States, each enjoying a certain degree of independence ' (L.B. 25). The Arthasastra and the Dharma Sastras, while advising the King to appoint a hierarchy of officials in the capital as well as in the Districts and Divisions, warned the rulers to be always watchful to prevent maladministration and oppression of the people by the officials of the State. Kautilya preferred payment of salaries to officials, but the Dharma sastras contemplate most of them being remunerated by assignments of lands ; and this practice seems to have been widely followed as a matter of convenience. Hioun Thsang records ' the Governors, Ministers, Magistrates and officials have each a portion of land assigned to them for their personal support ' (Beal. II, 88). In the Middle Ages, the system of military tenures and the practice of farming out the revenues of large areas introduced features characteristic of feudalism, the vassal or the revenue farmer claiming to exercise powers of Civil government including the right to administer justice. The country accordingly never possessed an efficient centralised system of judicial administration.

10. Religion and philosophy—Their relation to law.

The admixture of Religion and Ethics with Law has been the subject of much criticism. It is not merely sufficient to say that such admixture is to be found in all ancient systems. In the Hindu law, as in the Canon law, this circumstance was the result of a definite philosophy, whether it was right or wrong ; and this philosophy still remains part of Indian thought though divorced from the Law now in force here. It is difficult to take seriously the observation of Sir Henry Maine that 'there is no reason to suppose that philosophical theories had any serious influence on the jurisprudence of the Hindus. None of the remarkable philosophical theories which the genius of the race produced is founded on a conception of the individudual as distinct from that of the group in which he is born.' (E.H., 330). He speaks with his usual contempt of 'Brahminical India persisting at a stage at which a rule of law is not discriminated from a rule of religion' and considering that the transgression of a religious ordinance should be punished by civil penalties and that the violation of a civil duty exposes the delinquent to Divine correction (Anc. L 28) . He chooses to ignore the basic assumption of the Canon law which till not very long ago, held sway both in England and on the Continent, in respect of many aspects of civil life. The fact that in England this part of the law was administered by a separate set of tribunals cannot make any difference.

In Mediæval Europe, the Church not only claimed exemption from secular authority for the

clergy but also claimed jurisdiction over all people in respect of certain matters which will now be regarded as subjects of Civil Jurisdiction. Everything which pertained to the cure of souls was to be tried in the courts of the Church. The civil authority had to uphold and enforce the decision of the Ecclesiastical courts (Hist. Jur. 338 to 347). Though there were disputes now and then as to the respective spheres of jurisdiction of the King's Courts, and the Ecclesiastical courts, the State in England automatically enforced sentences of ex-communication passed by the latter, by imprisonment of the excommunicate. "The State regarded itself as under a duty to enforce obedience to the laws of God and the Ecclesiastical courts were the instruments through which the State acted." (H.E.L., I, 616). An English statute of 1415, required all officials (including the Justices of Assize and the Justices in Quarter Sessions) to assist the Ecclesiastical courts. Elizabeth's Act of Supremacy authorised the establishment of the Court of High Commission for the trial of ecclesiastical offences. A sentence of excommunication did not merely involve imprisonment by the Sheriff, till the bishop withdrew the Writ of Excommunication on submission by the excommunicate. The temporal consequences of excommunication were serious. 'The excommunicate could not do any act which was required to be done by *Probus Et Legalis Homo.* According to Bracton, he cannot sue any one though he may be sued. * * *. He cannot serve upon Juries, cannot be a witness in any court, and worst of all cannot bring an action either real or personal' (H.E.L. I, 631.) With the

elaboration of the theory of Royal supremacy in Henry the Eighth's time, the dual control over things temporal and things spiritual came to an end. The law of the Church became national like the Church itself. The King's Ecclesiastical Law was substituted for the Canon Law. The jurisdiction of the Ecclesiastical courts was in course of time weakened by the disappearance of the idea that it was a duty of the State-Church to use coercive measures to secure *Pro Salute Animae* the morality of all the members of the State. After the Restoration, the State provided by legislation punishment for many offences which had theretofore, been left to the Ecclesiastical courts (*Ibid.*, 620). From the time of Elizabeth, the King's Court exercised a power to quash the Writ *De Excommunicato Capiendo*. Excommunication is still a punishment for offences of Ecclesiastical cognisance and it was only in the 19th century that an excommunicate was relieved from civil penalty (other than imprisonment not exceeding 6 months.)

It was only with the Renaissance that there set in a period of faith in Reason and the Protestant Jurist-theologian developed a theory of Law divorced from theology and resting solely upon reason (Pound's *Introduction to the Philosophy of Law*). In India, there was no worldwide commercial activity, no decay of the ancient faith, no new and utterly antagonistic creed to destroy the unity of Religion, Ethics and Law. The dissociation of Morals from Religion and of Law from Morals and Religion has no doubt been regarded as a mark of progress ; but modern thought cannot be said to be altogether happy

over this. 'Without religious sanction' says a writer, 'morality becomes mere calculation and everyman devotes his intelligence and education to outwit the Commandments'.

11. The Concept and the theory of Dharma.

The political and as part thereof the Judicial system of the Hindus cannot be correctly understood without a proper appreciation of the Hindu theory of Dharma. It has been observed by Salmond that juridical terms will be found to throw some light upon juridical ideas. The English language contains no generic term which combines the ethical and legal meanings. The Sanskrit language has no term to convey the legal meaning dissociated from the ethical sense. In *Ancient Law*, Sir Henry Maine chose to describe the Manusmriti as a 'Code of Law' (like the Twelve Tables of Rome) and then criticised it for mixing law and religion. Later (in *Early Law and Custom*) he himself recognised the mistake and observed that the Manusmriti must have been compared to the Leviticus. 'These ancient books' he said 'are intended to guide the Faithful from birth to death and give him full directions for living.' The Hindus have never called their Dharma Sastras by the name 'Law Books'. The Social ideals of the community materially influenced the character of its law. Certain rules came to be regarded as conducive to the realisation of those ideals and the State was made responsible for enforcing the observance of those rules. There is thus nothing strange in certain rules which we may now regard as rules of Religion or rules of morality being

enforced by the State; when so enforced, they become rules of Law. Speaking of early England, Holdsworth says: 'the result of ecclesiastical influence was that the line between offences which should be dealt with as crimes and offences against morality was ill-drawn. In England, as elsewhere, rulers considered that they were under as strict an obligation to promote morality and religion as to keep the peace.' (H.E.L. II, 50). The individualist jurisprudence of the West has established its predominance after prolonged struggle with feudal and theocratic conceptions derived from the social ties of human fidelity and of Divine guidance. In the same manner certain rules are the natural outcome of the conviction that the world was created and is governed by Divine providence. 'If individualistic civilization were now to give way before one based on a socialistic conception of the social tie, all the positions of our jurisprudence will have to be reconsidered.' (Vin. Hist. Jur. 157).

Dharma has been variously defined for various purposes and in various contexts. While at one time and from one point of view, it was regarded as *Aloukika Sreyas Sadhana* (means to other worldly good), it has been more widely recognised as the means to secure *Abhyudaya* (welfare in this world) as well as Nissreyasa (salvation). Kulluka speaks of it as 'relating to what has to be done to secure visible and invisible good'

दृष्टा दृष्टा र्थानु श्रेय परं.

The pursuit of Dharma signified life in this world with a view to the attainment of the ideal life in

the life to come. Dharma represented 'the privileges, duties, and obligations of a man, his standard of conduct as a member of the Aryan community, as a member of one of the castes (varna) and as a member in a particular stage of life (Asrama)' (*Kane*). It was thus not merely a religious concept and an ethical concept but also a sociological concept. Political life was conceived as a part of and not independently of the general scheme of man's existence. The Dharma hypothesis restricted the sphere of State-action in one respect, in that the State could not *make* laws—but it extended the State's sphere in another respect, because the State had to supervise the *whole* life of its subjects and not its material or secular sides only. Expounding the Islamic theory, Sir Abdur Rahim, says : 'the end of law is to promote the welfare of men both individually and socially, not merely in respect of life on this Earth but also of future life. The sanctions of Muhammadan Law were wider than those of any modern law, since it had the twofold object of spiritual benefit and social good. Its policy was to encourage obedience by offer of reward and to discourage disobedience by imposition of penalty awardable either in this world or in the next or in both' (M.J. 55). In another place, he says : 'Law has two aspects, religious and secular ; the religious policy is the discipline of the soul and improvement of morals, the secular purpose is the preservation of life, property, reputation, etc.' (page 147). As even the king was subject to the operation of the doctrine of Dharma, it was conceived to be his duty to see that each citizen did not swerve from *his* Dharma.

The aim of the State was to act in conformity with what was deemed to be the established order of the Universe. Hence, the word Dharma was treated as derived from *Loka Dharana* (sustaining the world). This should explain why the authority of the King and of the Courts was invoked not merely for the protection of what may be described as civil rights and liberties but generally for the prevention and punishment of deviation from Dharma. The books on Polity (Arthasastras) discussed the King's duties from the point of view of political theory and statecraft. The Dharmasastras dealt with the question as part of the Swadharma of the King. But even Kautilya recognised the duty of the king not to allow people to swerve from Swardharma, and added that punishment awarded with due consideration helped people to realise the ideals of Dharma Artha and Kama (Book, I, Ch. IV). The sentence from the Neetivakyamrita 'Obeisance to the State wherefrom Dharma and Artha result'

धर्मार्थ फलाय राज्यायनमः '

with which Mr. Jayaswal introduces his work on Hindu Polity is itself significant. Nevertheless, the Hindu State was not theocratic or sacerdotal in the strict sense. The king was not a priest nor the expounder of the Sacred Law. The Brahmins had no organisation of their own directly participating in administration; they were only advisers or sometimes Officers of the King.

12. Sources of the Hindu Law.

Like all ancient systems of law, the Hindu Law was believed to have had a divine origin. Hammurabi was believed to have received his Code from

the Sun-God. Moses received the Commandments from Jehovah. Similar beliefs were entertained as to the laws of Lycurgus in Greece and of Numa in Rome. Dr. Jolly could not resist the temptation to limit to 'Oriental' countries, his observation about law being an integral part of religion and ethics. It would be more true to say 'all over the world, men have shown themselves eager to believe that rules for the guidance of their conduct have been specially laid down or revealed to them by some superhuman power. * * * It is easy to exaggerate the extent to which the jural order of the Romans was established on a purely secular basis. Cicero believed that Justice and the whole system of social life depended upon the Gods and man's belief in them. The law according to Roman ideas rested on a double foundation of divine revelation and human ordinance' (Rob. pp. 31 to 34). The Roman law no doubt took on a secular character at a comparatively early stage in its history (Jol. p. 86); this was the result of an accident, *viz.*, the foundation of the Republic which vested the *Imperium* in the Consuls and transferred the regulation of things sacred to a new spiritual officer, the head of the College of Pontiffs (Str. Dav. pp. 25-26). The Imperium was deemed to have been conferred not by heaven but by the Will of the Sovereign *populus* (*Ibid.* p. 103). After the advent of Christianity and the rise of the Church to power, things changed. The theory of the Canon Law was that the fundamental rules of law had been derived from a divine source (Vin. Col. P. II, p. 358). This theory affected all systems of law in Europe which in greater or less degree

came under the influence of the Canon Law. In England, Keble, J., said, as late as 1653, 'there is no law in England but is as really and truly the law of God as any scripture phrase, *i.e.*, by consequence from the very text of scripture : for there are very many consequences reasoned out of the text of scripture ; so is the Law of England the very consequence of the Decalogue itself.' (*R.* v. *Love*, 5 State Trials 43, 172). Even Blackstone concluded that all human law rested on the twin foundation of the Law of Nature and the Law of Revelation (Rob. p. 46). To quote Vinogradoff, 'Looking back on the historical evolution of Jurisprudence, we may discern three stages : the first stage of thought is dominated by the idea of Providence. In this respect, there is no fundamental difference between the Heathen world and the Christian world. All societies place in the centre of their conception of the human world, the idea of the guidance of Providence. * * * As man is directed by God's Supreme power; this power must account for the fundamental rules of conduct in morality and in law (Vin. Col. P. II, 348). It is only about the middle of the last century that the relation of the English Law to God's law was stated in the following words : 'We do not hold the marriage to be void because it is contrary to the Law of God, but because our Law has prohibited it on the ground of being contrary to God's law. It is our laws which make the marriage void and not the law of God.' (Per Lord Cranworth in *Brook* v. *Brook*, 9 H.L.C. 193 ; see Allen-*Law in the making*, 3rd edition, pp. 367-369). After referring to various matters in respect of which the Church

exercised jurisdiction during the Middle Ages, Mr. Robson concludes, 'with such analogies in our own recent past, it is absurd for us to condescend or adopt an attitude of superiority towards those who happened to be a few paces behind us on the same path that we have ourselves trodden.'

The Muslims, while claiming a divine origin for their law, drew a distinction between that part of it (the Quran) which was believed to contain the revelation 'in God's own words' and another portion (the Prophet's precepts) 'inspired and suggested by God but expressed in the Prophet's own words.' An analogous distinction is drawn by the Hindus between the Vedas and the Smritis. As regards the Vedas, orthodox Hindu theory would not even accept that they are 'God's words' because even God must be regarded as a *Purusha* (or Being), while the Vedas are claimed to be *Apourusheya* (not uttered by any being, human or divine) and hence Eternal. The Vedas however do not contain any direct statements of Rules of law ; in the words of Mr. Kane 'they contain disconnected statements on various aspects of Dharma' from which some rules bearing on Vyavahara may be inferred or deduced. It is to the Smritis that we have to turn for a formal and connected treatment of the topics of Dharmasastra. The recognition of the authority of the Smritis was itself an important step forward in the development of the Hindu Law. Though believed to embody what the Sages 'remembered' (from Vedas known or unknown), the Smritis imply human authorship and thus introduced human agency in the declaration of the law. On this very ground, their

authority was challenged and it was not without a struggle that their authoritative character was established, first as subsidiary to and later as equivalent to Revelation (Jha. pp. 2 to 5 ; Gharp. Vol. 29, pp. 19 to 22). A further stage was reached when commentators like Vignaneswara and Mitramisra were prepared to assert that anything in the Srutis (Revelation) bearing on Vyavahara was only in the nature of *Anuvada* (statement of what is found prevailing in the world) and where a practice so referred to had ceased to be followed or to command general approval, it might be treated as no longer authoritative or binding.

Whatever may be the assertion in the later Smritis, one of the earliest is interpreted by Mr. Jayaswal as recognising that the Dharma Rules *originated* in 'Samaya' or communal rules agreed upon in assemblies, and that the Vedas were then only of secondary authority. In support of this view, he relies on the language of the opening Sutras of Apasthamba : 'conventions of people conversant with Dharma are authority : also the Vedas'

(धर्मज्ञसमयः प्रमाणं ; वेदाश्च)

The reference in the very first Sutra to '*Samayacharikan Dharman*' lends support to this view. That such conventions formed part of Hindu practice is shown by an interesting inscription referred to by Mr. Mahalingam. This records an agreement among the Brahmins of a locality that they shall perform Marriage only in the *Kanyadana* form and that those who pay or receive money shall be ex-communicated and punished by

the King. (Vij. p. 256 ; see also Definitions of Samaya by Brihaspati and Narada quoted in L.G., pp. 129 and 130).

Looking at the matter historically, Apasthamba's Sutra seems to be reminiscent of the origin of all Law in Custom and Convention, before it was defined and crystallised in the form of rules, of the state of unconscious evolution that preceded that of conscious law-making. The beginnings of legal rules have to be sought in Non-litigious customs. Later law also recognises the validity of custom ; but there is a marked distinction between the *original* body of customs which in all communities was the basis of the law and later or local customs which were recognised only under special conditions. In the process of its transformation into 'law,' the original body of custom got defined and reshaped by tribunals, lawyers and writers. This is presumably what happened in India when the Smritis took the place of unrecorded custom.

The claim of divine origin served to secure for early law a stability and force which it would not have otherwise possessed. It restrained the action of those in authority and its unchangeableness conduced to social order during stages in which strong restraints were most needed (Herb. Sp. pp. 609, 610). No doubt, it also produced a certain unadaptiveness which impeded progress when new conditions arose. Students of the Hindu law must be familiar with the ways and devices by which this defect was attempted to be remedied to the extent which conditions prevailing in India fifteen or twenty centuries ago and the Ethical

and Philosophical theories of the time permitted. Another advantage that resulted from the early association of Law with Religion in this country was the establishment of a reasonable measure of uniformity of law throughout the land. If the pre-existing customary laws had continued to be recognised only on the basis of custom, a bewildering variety of customary laws in different parts of the country would have been the result. The former state of the law in Germany and the present state of the customary law in the Punjab must serve as a warning. In England, the operation of a centralised system of Royal justice helped in due course to superside the customary law of each country which had theretofore been administered by the Country and Hundred Courts. In India, there was no such centralised system of administration in ancient times. When law became part of religion, the same law was followed by all who professed that religion. Later variations were only in matters of detail and arose out of divergent interpretations of texts admitted to be authoritative everywhere.

13. Import of the terms Smritis and Sastras.

Smritis and Sastras as generic terms are of wider import than what we recognise as Law books in our Courts. Hindus associate the leading Puranas and Ithihasas as well as what are called Sastras with the names of great Sages. Though, as a matter of etymology, *Sastra* implies Command (*Sasana*), it is not command in the Austinian sense that is contemplated. The word may indeed be said to denote a body of systematised knowledge ;

the true implication rather is that the work lays down means (*Sadhana*) to attain a particular desired end (*Sadhya*). In an age that did not rely much on experiments, it was believed that only Sages had the wisdom to perceive and to teach the means requisite to attain a desired end—especially when every act of man was held to be productive of visible (*Drishta*) as well as invisible (*Adrishta*) consequences.

When the ends (Purusharthas) likely to be pursued by men came to be classified under the four well-known heads—DHARMA (spiritual merit), ARTHA (material possessions), KAMA (pleasures of the senses), and MOKSHA (Emancipation), the Sastras were likewise grouped as DHARMASASTRA, ARTHASASTRA, KAMASASTRA and MOKSHA SASTRA.

14. Dharmasastras and Arthasastras.

Pursuing a suggestion thrown out by Dr. Buhler (S.B.E. Intro. p. xxvi), Mr. Jayaswal has put forward the theory that before the Manusmriti, secular Law must have been developed in the schools of Politicians and Statesmen and therefore dealt with only in the Arthasastras, that the Dharmasutras did not make secular law their proper subject and that the Manusmriti was the first Dharma work to invade the sphere of Law proper. The object of this invasion (according to Mr. Jayaswal) was to recast the law on lines acceptable to Brahmins, taking advantage of the opportunity afforded by the support which the Sunga dynasty is assumed to have given to the pretensions of Brahmins. In another connection I shall refer

at some length to Dr. Bhuler's suggestion. The Manusmriti has in recent times been the target for attack from different quarters. I will have to deal with some of these criticisms, so far as they relate to the merits or contents of the legal parts of the work. It is obviously embarrassing to me to discuss criticisms on sectarian lines (whether from European or from Indian scholars) ; I therefore leave such criticisms alone. Two obvious objections to his view, Mr. Jayaswal could not ignore, *viz.*, (i) that some topics of law had in fact been dealt with even in the Dharmasutras of Gautama, Baudhayana and Apasthamba, and (ii) that the Manusmriti could not be assumed to have come into existence only during the Sunga period, as some work of (some) Manu (referred to as the work of the Manava school in Kautilya's Arthasastra and even in the early Dharma Sutras) had been in existence long prior thereto. The first objection he seeks to get over by pointing to the comparative scantiness of the law portion in the early Dharma Sutras. But in laying stress on this circumstance, he ignores the natural probability that by the time of those Sutras—if we properly assess their antiquity—many branches of law could scarcely have become sufficiently developed or crystallised to be capable of being stated in the form of rules. The history of the evolution of other systems of law also supports the probability that in the earlier stages, the formulation and development of law were mixed up with the study of Religion and Ethics, which is the subject-matter of the Dharma Sastras. As regards the earlier Manava work, Mr. Jayaswal thinks that it must have been a work on Artha and not

on Dharma. This would not explain the reference to the Manava in the early Dharma Sutras. We have had all kinds of speculation put forward by different writers as to the earlier Manava work and Mr. Jayaswal's suggestion can only be regarded as another speculation. Even as regards the Manusmriti, it has been stated that there must have been several recensions, though it has not been possible to reach a definite conclusion as to the dates of the earlier recensions. In the absence of the earlier texts, we cannot say on what matters and in what respects the several recensions differed from each other. Further, even in respect of the present text of the Manusmriti, scholars are not by any means agreed that it belongs to the period of the Sunga kings. The socalled Brahmin ascendency (if any) did not begin with the advent of the Sunga kings. Whatever might have been the plight of Brahminism during the days when Buddhism held the field, it had acquired a position of importance even before the rise of Buddhism. Again, none of the earlier Arthasastra works mentioned in Kautilya's book is now available; and it will be nothing more than a guess to assume that topics of secular law must have been more fully dealt with in them than in the available Dharma works of the early period. It must also be added that only a few of the early Dharma works are now available, and in the absence of the texts of the other works, we can come to no satisfactory conclusion as to the topics dealt with in them.

There are no doubt material differences on some points between the Manusmriti and the Artha-

sastra of Kautilya ; but this by itself will not help to establish Mr. Jayaswal's proposition. The Arthasastra itself refers here and there to the views of the Manava school and indicates the author's dissent. Mr. Jayaswal refers to the 'ferocity' of Manu's criminal law. It will be interesting to see what punishment Brihaspati, an early writer of the Artha school (not to be confounded with the later Brihaspati of the Dharma school) provided for false witnesses. At the end of the chapter relating to 'recovery of debts' (Book III, chapter xi) Kautilya refers to the views of the Manavas and the Barhaspathyas as follows :—'False witnesses,' say the followers of Manu, 'shall be fined ten times the amount which they cause to be lost.' 'If,' say the followers of Brihaspati, 'owing to their having been stupid, they render a case suspicious they shall be tortured to death.' Expressing his dissent from both, Kautilya adds 'witnesses (who attest transactions) have no doubt to listen (to what is happening); if they have not minded it, they shall be fined 24 panas ; if they did not speak they shall be fined half the above fine.' Kautilya's advocacy of moderation in punishment was a matter of policy and it had nothing to do with any reaction against Brahminism. Indeed, one line of attack against the Arthasastra itself was that its author (Vishnugupta or Chanakya) was a Brahmin. It is significant that he winds up Chapter IX of Book I (relating to the appointment of Councillors and priests) by praising Kshatriya rulers 'who are helped by Brahmins' and 'faithfully follow the precepts of the Sastras.'

Mr. Jayaswal makes a further point that the earlier Dharmasastra literature 'recognised' the high authority of the Arthasastras, whereas Manu subordinates Arthasastra to Dharmasastra. It is not clear what Dharmasastra it is that Mr. Jayaswal refers to as having recognised the authoritativeness of the Arthasastra. The weight of his argument is weakened by his own assertion that according to the Mahabharatha, the Vyavahara laws were equally authoritative with the Dharma Law, because the prevalent view attributes the Mahabharatha also to the same period of Brahminical ascendency as Manu. It is perhaps not correct to say that the Mahabharatha recognises the Arthasastra as *equally* authoritative with the Dharmasastra (on this point, see the discussion in Professor Rangaswami Iyengar's Introduction to the Rajadharma Kanda of the Kalpataru, Gaikwad's Oriental Series Edition, pp. 5 to 9). Mr. Jayaswal's argument may now be considered on its merits.

15. The Superior Authority of the Dharmasastras explained.

At one stage of Indian thought, when *Pravritti marga* (the life of action) was regarded as incompatible with Moksha or emancipation, the aspirant after the latter was advised to follow only the *Nivritti marga* (life of renunciation or inaction). On this basis, the truly religious man could have nothing to do with Artha or Kama or the Sastras relating thereto. 'The development of Indian thought was determined by a conflict between 'world and life-negation' and 'world and life-affirmation'; the issue was decided by the former

making ever greater concessions to the latter, though the former was maintained as long as possible as a fundamental principle.' (Schweitzer, *Indian thought and its development*). The change was brought about by the line of thought which culminated in the philosophy of the Gita. The Gita proclaimed that it was not 'action' that was to be eschewed but the element of 'self' associated with it. That even the pleasures of the senses were not to be wholly condemned was made clear when Sri Krishna said that he himself represented that Kama in Beings which was not inconsistent with Dharma'

(धर्माविरुद्धो भूतेषु कामोऽस्मि—Gita, Ch. VII, Verse xi).

The orthodox view never minimised the importance of Artha. The Manusmriti itself says "Some say that Dharma and Artha are the only good in life, others aver that Kama and Artha are the highest good, still others hold that Dharma is the only good and lastly some say that Artha is the only good thing : the truth is that all the three are good." II 224.

धर्मार्थावुच्यते श्रेयः कामार्थौ धर्म एव च ।
अर्थ एवेह वा श्रेयः त्रिवर्ग इति तु स्थितिः ॥

The New philosophy advised the average man that without risking his salvation in due course, he could participate in a life of worldly activity if only it was not motivated by selfishness, attachment or the desire for reward. The question then arose, what else was to be the motive for action, what was to furnish the rule of conduct for each man.

The answer was furnished by the doctrine of *Swadharma*, each man being directed to ascertain *his* duties by reference to the Sastras. The Gita said 'in determining what should be done and what should not be done, the Sastras are your authority.'

तस्मात् शास्त्रं प्रमाणं ते कार्याकार्यव्यवस्थितौ ।

The Artha sastra and the Kama sastra were also Sastras ; but as they only related to *Drishta-phala* (visible fruits of actions) and were based only on Dhrishta Pramana (perception and reason as distinguished from revelation) and as exclusively material pursuits may jeopardise the virtuous life, a rule of preference had to be provided in situations of conflict. Here, it was only heretical schools, like the *Lokayatikas* (who did not believe in a future life) that gave the preference to worldliness. All schools which in any form recognised a future life or the doctrines of Karma and Transmigration directed that Artha and Kama should be sought only without prejudice to Dharma. Thus, the Kamasutras of Vatsyayana begin with the words 'Obeisance to Dharma, Artha and Kama' and Sutras 6, 7 and 8 of the opening Adhyaya treat Manu's work on Dharma, Brihaspati's work on Artha, and the author's predecessors' work on Kama as but parts of an earlier single work by Prajapati. The second Adhyaya of the first Adhi-karana is devoted to the discussion of all the three ends, Dharma, Artha and Kama. The dicussion will be found to be instructive. It will be sufficient here to state that while the first sutra of that Adhyaya prescribes that the three ends should be

combined as far as possible but so as to make sure that the pursuit of one will not mar the rest

(अन्योऽन्यानुबद्धं परस्परस्यानुपघातकम्)

the 24th Sutra provides that their relative importance must be taken to be in the order of Dharma, Artha and Kama'

(तेषां समवाये पूर्वः पूर्वो गरीयान्—)

The difficulty which lay men must feel in reconciling these three ends or in choosing between them was clearly realised. Hence arose that part of the Hindu social arrangement which divided man's life on earth into four stages or Asramas. On this basis, Vatsyayana provided that youth should be utilised for the acquisition of learning and material wealth, that manhood should be utilised for the enjoyment of sensual pleasures and that in old age, man should think of Dharma and Moksha. He makes an exception in the case of Kings and of public women, providing that for them Artha is more important than Dharma. The reason is stated to be that in their case their earthly career depends upon wealth

(तन्मूलकत्वाल्लोकयात्रायाः Sutra 16).

In the Artha Sastra, Kautilya recognises that Dharma and Adharma have to be learnt from the Vedas (Book I, chapter ii) ; and, in the next chapter, he says 'as the triple Vedas determine the respective duties of the four castes under the four orders (Varnasrama Dharma) they are the most useful'. Then comes the statement 'the observance of one's own duty (Swadharma) leads

one to Swarga (heaven) and Anantya (Eternity or Infinite Bliss). Hence, the King shall never allow people to swerve from Swadharma; for whoever upholds Swadharma, ever adhering to the duties of Aryans and maintaining Varnasrama will surely be happy both here and hereafter.' In chapter vii Kautilya deals particularly with the life of a Rajarshi (Saintly ruler). His advice to him is 'enjoy pleasures (Kama) without violating the rules relating to righteousness (Dharma) and to wealth (Artha); but don't deny yourself happiness. Pursue the three aims equally, but anyone enjoyed to excess endangers not only the other two but even itself.' To this broad statement he adds a qualification, representing his own view, in the following words 'Artha alone is important, Dharma and Kama depend upon Artha for their realisation'

(अर्थ एव प्रधानः अर्थमूलौ हि धर्मकामौ ।)

In the context, this preference in favour of Artha has to be understood as applicable not to all men, but only to kings—a view confirmed by the way in which the author of the Kamasutras has stated the same principle. Kautilya's book itself was only meant for the instruction of kings. He defines Artha not as wealth generally but in words

मनुष्याणां वृत्तिरर्थः मनुष्यवती भूमिरित्यर्थः

which signify 'the territorial possession of a king.' He accordingly defines 'Artha Sastra' as the science of acquiring and maintaining the kingdom. The opening words of the book state his purpose in these words: 'This Arthasastra is prepared

as a compendium of almost all the Arthasastras which have been composed by ancient teachers, dealing with the subject of the acquisition and maintenance of Prithvi (kingdom).' It must be noted that even in respect of kings, the Dharmasastra point of view insisted that they should be free from anger and *coveteousness* (Lobha). See Yagn. II, i. Visvarupa, commenting on this verse of Yagnavalkya, says 'he should not be primarily addicted to the pursuit of wealth with a view to fill his treasury.

(न कोशसंचिचीषया अर्थप्रधानो भवेत्)

16. The Scheme of the Manusmriti.

The Manusmriti covers a wide field because in view of the doctrine of 'observance of Swadharma' it had to prescribe the duty of every Varna and Asrama, in society as it then existed. In the familiar manner of such works, the book begins with a question 'Please instruct us as to the respective Dharmas of people belonging to the several Varnas and of people of mixed descent.' (Varna here includes Asrama also by implication) Chapter I, 107, states 'In this, have been described, virtues (or duties) in their entirety, the merits and demerits of acts and the eternal rules of conduct which govern the four orders'

अस्मिन् धर्मोऽखिलेनोक्तो गुणदोषौ च कर्मणाम् ।
चतुर्णामपि वर्णानामाचारश्चैव शाश्वतः ॥

Critics seize upon certain passages in the book which seem to extol the Brahmin; but they lose

sight of the fact that the purpose of all this elaboration was to persuade the Brahmin to give up the pursuit of Artha and in a large measure even of Kama and devote himself to the pursuit of Dharma and Moksha (*see* the concluding verse of chapter VI). As observed by Professor Rangaswami Iyengar, " the critic is often inclined to ignore the texts which subject the Brahmin to a mode of life and discipline so combining hardship and poverty that it would not be undertaken voluntarily to-day or perhaps any day." In another place, he states ' the attempt was to provide Social eminence for those who were denied economic advantages.'

Having laid down the duties of the first Varna in all its Asramas, the author of the Manusmriti turns to the Dharma of the next Varna, the Kshatriya (*see* the opening verses of Chapter VII). That he regarded the Kshatriya as of equal importance with the Brahmin will be clear from Chap. IX, versus 319 to 322, where he advises harmony between the two communities. To the Kshatriya he permits the three *purusharthas*, viz., Dharma, Artha and Kama ; but he too is conscious of the difficulty of reconciling the three. In verses 151 and 152 of Chap. VII, he advises the King, during his leisure hours, to ponder over the realisation of Dharma, Kama and Artha which are ' mutually antagonistic '. (परस्परविरुद्धानां) A different reading परस्पराविरुद्धानां has been adopted by some commentators ; even this would only mean ' how they could be realised without mutual antagonism.' Such being the author's purpose, it was only natural that the Smriti should devote considerable

space and attention to the duties of a king—not, like Kautilya, with a view to increase the king's wealth and power by any means, but to show how a righteous king should conduct himself (*see* Chap. VII, verses 35, etc.). Chapter VIII starts describing the king's role in the administration of justice ; the whole chapter and the next chapter prescribe in detail the way in which the king and the Sabha should deal with the various matters coming before the king in his judicial capacity. That such was the scheme is made clear by the words in which the Mitakshara introduces the corresponding section (Chap. II) of Yagnavalkya. It says 'it has been already stated that the king should himself attend to Vyavahara, but nothing has been said as to the nature of Vyavahara, as to its variety, and as to the ways of dealing with it. The 2nd chapter deals with these things.' If the duties of the Brahmin required five chapters, there is nothing unnatural, (or in the nature of *Invasion*, as Mr. Jayaswal calls it) in the duties of the king being dealt with in three chapters of the Manu-smriti. The duties as then understood of the other two Varnas (Vaisya and Sudra) were comparatively simple and they have therefore been disposed of by a few slokas at the end of Chap. VIII.

17. The Authority of Arthasastras.

As to the authority accorded to the Artha-sastra works by the Dharma school, the extant Dharma Sutras contain no specific provision. No inference can however be drawn from this, because

we are not in a position to say whether there were any Arthasastra works at the time when these Dharma Sutras were composed and if so, what they contained for the Dharma Sutra writers to take exception to. Coming to the Dharmasastras, the attitude of the Manusmriti is indicated by the provision in Chap. VIII, 3 and 8 that the king should decide disputes according to the practices prevailing in the country and in 'accordance with eternal Dharma'.

(धर्मं शाश्वतमाश्रित्य)

The point is more definitely adverted to by Yagnavalkya. The first sloka of Chap. II, provides generally for 'decision according to Dharmasastra.' This is interpreted by Vignaneswara as *totally* excluding Arthasastras. Such an interpretation would however scarcely be consistent with the way in which some ofthe other Dharmasastras have stated the position. Amongst the other commentators, Visvarupa's comment on this sloka is only to the effect that the king should not attach undue importance to Artha with a view to improve the state of his treasury (the passage has already been quoted). The Viramitrodaya says 'this has been so specifically stated only to show the paramount importance of the Dharmasastra in the determination of a cause but the Arthasastra also has to be considered.'

(धर्मशास्त्रस्य प्राधान्यं दर्शयितुं विशेषोपन्यासः विचारे अर्थशास्त्रस्याप्यनुसर्तव्यत्वात्)

The twenty-first sloka of the same Chapter declares

"the fact is that Dharmasastra is of greater authority than Arthasastra."

(अर्थशास्त्रात्तु बलवत् धर्मशास्त्रमिति स्थितिः)

Vignaneswara takes the word 'Arthasastra in this verse, to refer not to the works passing expressly under this name,—because they have, according to him, been totally excluded by the very first verse of the chapter ; but to such portions even of the Dharmasastra works as deal with Rajaniti (King's duties). It will perhaps not be improper to interpret this statement of Yagnavalkya in the light of what Narada and Katyayana have provided. The former expressly says :

धर्मशास्त्रार्थशास्त्राभ्यामविरोधेन पार्थिवः ।
समीक्षमाणो निपुणं व्यवहारगतिं नयेत ॥

'The King shall conduct the enquiry of law suits, skilfully, without violating the rules of the Dharmasastra and the Arthasastra.' Katyayana when describing the qualifications of Sabhyas (members of the Court) describes them as 'well-versed in the meaning of Dharmasastra and conversant with Arthasastra' (धर्मशास्त्रार्थकुशलैरर्थशास्त्रविशारदैः)

Commenting on this, Jimutavahana (in his Vyavahara Matrika) says : 'both Dharmasastra and Arthasastra are mentioned as the administration of justice has to be rendered in conformity with both Dharmasastra and Arthasastra. In the event of an irreconcilable conflict between the two, Dharmasastra alone should be preferred as it is the stronger.'

(धर्मशास्त्रार्थशास्त्रयोरविरोधेन न्यायदर्शनं कार्यमित्युभयोरुपादानं असमाधेयविरोधे तु धर्मशास्त्रमेवादरणीयं तस्य बलत्वात्.)

In another connection, Katyayana speaks of Dharmasastra and Arthasastra as the two main props of Vyavahara (*Skandha-dvayam*). The Smritichandrika adopts the narrower view of Vignaneswara but the author cites another verse from Narada, which expressly says 'where there is a conflict between the Dharmasastra and Arthasastra, what is laid down in Dharmasastra should be followed, abandoning what is said in the Arthasastra.'

यत्र विप्रतिपत्तिः स्यात् धर्मशास्त्रार्थशास्त्रयोः ।
अर्थशास्त्रोक्तमुत्सृज्य धर्मशास्त्रोक्तमाचरेत् ॥

The Smritichandrika adds, 'this following of both sastras is practicable only when there is no conflict between the two.'

(एतच्चोभयविधशास्त्रानुसरणं तयोः मिथो विरोधाभावे एव.)

The reason for the preference of Dharmasastra to Arthasastra is stated in the Viramitrodaya, which (as already mentioned) points out that the Arthasastra pays heed only to *Drishtapala* (visible results) whereas the Dharmasastras take note of both *Drishta* and *Adrishta* fruits. As long as the community believed in a future life and in effects thereon of acts committed during this life, this distinction was bound to be maintained.

Mr. Jayaswal states that Kautilya would give Vyavaharasastra preference over Dharmasastra,

in the law courts. Whether such is the true implication of the Arthasastra or not, it is nowhere, so stated in terms. If Mr. Jayaswal had in mind certain passages in Book III, this does not seem to be the true import of those passages. Express reference is made to Vyavahara in the sloka

धर्मश्च व्यवहारश्च चरित्रं राजशासनम् ।
विवादार्थश्चतुष्पादः पश्चिमः पूर्वबाधकः ॥

'Dharma, Vyavahara, Charitra and Rajasasana were the four legs of law-suit : of these, each later is preferable to (or overrides or bars) the preceding,' the passage occurs in a slightly different form in Narada also. But the word *Vyavahara* in this passage cannot mean *Vyavaharasastra*, because the next verse explaining the preceding one adds

व्यवहारश्च साक्षिषु

'Vyavahara lies in (depends on) witnesses'. The passage which follows, far from supporting Mr. Jayaswal's suggestion, seems to overthrow it. I shall deal with these and other similar verses in another connection. Subject to this preference in favour of Dharmasastras, the Arthasatras and their successors the Nitisastra works seem always to have been regarded as part of Hindu legal literature. Even the Ithihasas and Puranas furnish some useful material for this study, particularly the Mahabharata and the Agnipurana. The Editors of the Dharma Kosa have accordingly included numerous extracts from Kautilya, from the Sukraniti, and from the Mahabharata and the Agnipurana in their Vyavahara section.

18. The dates of the Dharma Sutras and the Dharma Sastras.

Attempts at a historical study of the evolution of the Hindu Judicial System in the several stages covered by the Hindu law books are handicapped in two ways. Many of the early Sutra works are no longer available. Even of the later Smiritis, some, like those of Vyasa, Pitamaha, Harita and Sankha-Likhita, from which very interesting extracts are found quoted in the commentaries or Nibhandas, are not available in their entirety. Even the Smiritis of Brihaspati and Katyayana, whose merit and value have been widely acknowledged, have only been tentatively 'reconstructed' by Mr. K. V. Rangaswami Iyengar and by Mr. Kane respectively, by collecting the extracts cited in later works. (Dr. Jolly had earlier made a similar though smaller collection of passages from Brihaspati). It would have been more helpful if the works had been available in their entirety and according to the arrangement adopted by the authors themselves. Again, none of the early Arthasastra works is available. Even that of Kautilya was only recently discovered; and it gave rise to a fierce controversy as to its genuineness. Secondly even in respect of the available Sutras and Smiritis, there are problems of chronology which can scarcely be said to have yet been satisfactorily solved. The dates to be assigned to the early sutras are still only matters of conjecture. Scholars differ not only as to their respective dates but even as to their order. For instance, taking the three leading Sutra works, Dr. Jolly would give their order as Gautama, Baudhayana and Apastamba;

Mr. Jayasval would have it as Baudhayana (about 500 B.C.); Apastamba (300 B.C.) and Gautama (200 B.C.). Mr. Kane would place Gautama somewhere about 600—400 B. C. Even as regards the later works, the position is by no means definite. The question of the date of the Manusmriti is complicated by theories as to different recensions and additions, interpolations, etc., in respect of the existing text. As regards Brihaspati, Mr. Kane would date it after the second century A.D., whereas Mr. Rangaswami Iyengar would refer it to the second century B. C. As regards Vyasa, Mr. Jayaswal would say that though the work is fairly ancient, the Vyavahara portion of the Smriti was probably a later interpolation based on the views of Vignaneswara. Theories of interpolation of some portions have been advanced by Dr. Buhler even as regards the Vasishta Dharma sutras, though he differs on some points from Dr. Jolly (*see* S B E Vol. XIV, intro.). As regards the Vishnusmriti, Dr. Jolly even while admitting the antiquity of the Sutra of that name, is of the opinion that considerable portions of the extant work of that name must have been added or recast at later periods (*see* S B E Vol. VII, Intro.). There is also difference of opinion amongst scholars as to the chronological relation of Kautilya's Arthasastra to the Dharmasastra works. Mr. Jayaswal is positive that the Manusmriti and *a fortiori* the Smriti of Yagnavalkya must be of a later date than Kautilya's Arthasastra. Mr. Ganapathi Sastriar of Trivandrum, who has written a learned commentary on the Arthasastra, is of the opinion that there is no warrant for holding that

the Yagnavalkya Smriti must be later in date than the Arthasastra.

I do not feel competent to discuss questions like the above. I propose merely to take the early Sutras in one group, Manu and Yagnavalkya in another group and Narada, Brihaspati and Katyayana in a third group. The Arthasastra may be independently dealt with. It may be stated generally that the information available from Gautama, Apastamba and Baudhayana as to 'administration of Justice' is very meagre, that Vasishta deals somewhat more fully with that subject, that Yagnavalkya's treatment of that subject is more detailed precise, and systematic than Manu's, that there is greater similarity between the views of Yagnavalkya and Kautilya than between those of Manu and Kautilya and that Narada and Brihaspati represent an advance even upon Yagnavalkya, in respect of Judicial procedure. Dr. Jolly says : 'Narada's judicial theories show an infinitely advanced stage of development as compared to Manu's' and he refers particularly to Narada's treatment of the law of procedure 'abounding as it does in technical terms and nice distinctions and exhibiting a decided preference for documentary evidence and written records over oral testimony and verbal procedure' * * 'It is' he says 'the only complete Smriti in which law is treated by itself without any reference to rules of penance, diet and other religious subjects.' (*See* S B E Vol. XXXIII, Intro.). Even of Brihaspati, Dr. Jolly would like to think that like Narada, it might have formed an independent work in which forensic law was treated by itself without

any admixture of religious elements. Professor Rangaswami Iyengar's recent Edition of Brihaspati however shows that a large portion of the book deals with Achara and Prayaschitta. Katyayana is the latest of the Smritis now available in more or less complete form, as a result of reconstruction by Mr. Kane who assigns it to some time between the fourth and the seventh centuries, A.D. It is in some respects an advance even upon Narada and Brihaspati. Mr. Kane claims that 'Katyayana represents the high watermark of Smriti rules about procedure.' After Katyayana, one scarcely notices any great development in Hindu procedure. The commentators and Nibandhakartas have however in their endeavour to reconcile various texts formulated some new theories and worked out new applications of pre-existing theories.

19. The Judicial Power—its Origin and Growth.

Sir Henry Maine has stated that 'the King and the popular assembly are found side by side in a great number of human societies, when they first show themselves on the threshold of civilisation. In some communities, like those of Athens and Rome, the organs of freedom, namely the Assemblies, monopolise powers, but in communities spread over a large space of land, it is the King who grows and popular institutions decay.' Like all generalisations, this observation can be said to be true of India only with reservations. The judicial function of the King has been held by some historians to be the natural development of the patriarchal system while others would attri-

bute it to his position as military chief. A third suggestion connects it with the belief that as high priest or otherwise he was the representative of or in communion with the Deity. Spencer stresses the close connection that subsisted in early communities between modes of dealing with "external aggression" and modes of meeting "internal aggression," observing that "the gathering of armed men which was at once the Council of War and the political Assembly is at the same time the judicial body." He adds, 'when concentration in a town renders performance of judicial functions less burdensome, we see that along with retention or acquirement of predominant power by the popular element, there goes also exercise of judicial functions by it.' This is what happened in the Greek cities, particularly in Athens. He then refers to the various ways in which the King's judicial power may be delegated, when he becomes unable to exercise it personally. In Plantagenet England, the King's Council (and later a special part thereof) began to exercise judicial powers, and this led ultimately to the establishment of the Royal Courts at Westminster and to the exercise of judicial functions by the House of Lords and by the Privy Council. Vinogradoff refers to a controversy in England, during the thirteenth century, as to whether, the administration of justice by the King's Court was the outcome of Royal power or of feudal contract. The Judges held that the *Curia Regis* was not only a body with powers delegated to it by the King but also a meeting of the King's vassals. The Justices thus derived their office not only from the King but also from the circle of

Peers (Col. P, I, 215). In course of time, the king's courts at Westminster superseded the popular Courts and the feudal courts in the country.

20. Popular Justice and Royal Justice.

In republics, like Greece and Rome, where the sovereign authority was assumed to be vested in the people, justice was administered by the sovereign people themselves, directly or indirectly. In communities living under monarchical constitutions, the King's relation to justice has varied from place to place and from time to time. Speaking of conditions in Egypt, more than fifteen centuries before the commencement of the Christian Era, Lee says, 'In Egypt, the King was the supreme Judge of the whole land. He was represented by his Prime Minister who in judicial matters was assisted by the Judge of the Southern Kingdom. Under the Prime Minister were thirty men referred to as The Great Men of the South. They were both executive and judicial officers. The administration of justice in the rural districts was mostly entrusted to field Judges who heard matters peculiar to rural communities. Later, there was more centralisation and the Judges stayed away at the Court of the King. Elsewhere, they were represented by minor officials. Later still, a kind of feudal system followed, under which administrative functions were taken up by the local heads but judicial functions were retained by the King who made royal progresses through the country for the purpose of administering justice. The Court of the Thirty became a kind of supreme court.' (Hist. Jur. 56). Some information as to the systems

prevailing in Babylon and in ancient Persia is found in the book on *Babylonian and Assyrian Law* by C. H. W. Johns and a translation (published in Bombay by Mr. Bulsara) of the Laws of the Ancient Persians. Mr. Johns says : 'Judges seem to have existed in Babylonia from time immemorial. With them were associated as Assessors the elders of the City. How Judges were appointed, we do not know. We sometimes find the expression 'King's Judges (suggesting royal appointment).' There is also clear evidence of the office being hereditary. Doubtless, the King himself acted as a Judge on occasions ; sometimes the Judges acted as a College. The elders of the City continued to act as the Jury.' Hammurabi is said to have actively supervised the work of his provincial judges and to have acted as a 'Court of Appeal.' In Ancient Persia, it is said that the supreme Court was that of the Sovereign himself who would decide cases with the help of The Chief Judge, the Lord Advocate and Primate who was also well versed in Law. Courts were dispersed throughout the Empire. The course of development of judicial administration in the Hebrew land is thus described by Lee—'According to the primitive constitution, courts were to be found in every city or district and were composed of the Elders of the place. The King acted as a Superior Court. Those who were not satisfied with the decision of the Inferior Courts could appeal to the King. They also carried cases directly to him, especially in more important or difficult matters. With the centralisation of the legal and judicial system, the King's officers would be regarded as Superior to the local Magistrates who

derived their authority from the Community. The struggle between the two systems is illustrated in the Deuteronomic Code' (Hist. Jur. 101). The position in the Islamic countries is thus described by Sir Abdur Rahim :— 'The responsibility of administration rests with the Imam, but as a matter of convenience he may delegate his powers to different persons. He was the representative of the people from whom he derived his rights and privileges.' In the early days of Islam, justice was administered by Civil Judges who were appointed by the Caliph and were independent of the Governors. During the Caliphate, the Sovereign also performed the duties of a High Court of Appeal. (Amir Ali's *History of the Saracens*, pp. 62 and 196). The position in Anglo-Saxon England is thus described by Pollock and Maitland : Various assemblies were acting as Courts ; the King had no doubt judicial functions but it was not to see justice done in his name in the ordinary course, but to exercise a special and reserved power which a man may invoke if he has failed to get his cause heard in the jurisdiction of his own Hundred. There was no perceptible difference of authorities or procedure in Civil and Criminal matters until within a century before the Norman Conquest, when certain of the graver public offences were reserved for the King's jurisdiction. After the Conquest, the King's justice became organised and regular and, in course of time, it superseded nearly all the ancient County and Hundred Courts. (P. & M., I, pp. 37-40).

Speaking of ancient India, Lee observes 'the Royal system did not harmonise with the spirit

of the day. The villagers had a judicial system of their own at once familiar to and respected by them ; the various trades and guilds had a similar system. The presiding officer of the Popular Courts or the Guild Courts held office either by election or inheritance according to local custom. With him were associated three or five men. In these apparently private courts were settled the affairs of the everyday life. In cases of grave crimes or when the condemned party refused to obey the judgment of the local court, the court of the King was concerned with litigation.' (Hist. Jur. 141). This cannot be said to be quite a correct description of the position of the King according to the Sutras and the Smritis.

The executive power of the state, whatever its constitution, must naturally have been weak to begin with ; the administration of justice seems largely to have been the work of village Assemblies or other popular or communal bodies, whether with or without the authority of the King and whether with or without his presence, or the presence of some public officer. Speaking of Vedic India, the authors of the Vedic Index say, 'there is very little evidence in the early literature as to the administration of justice or the Code of law followed * * *.' There is no trace of an organised criminal justice vested either in the King or in the People. There still seems to have prevailed the system of Wergild (Vaira) which indicates "that criminal justice remained in the hands of those who were wronged." In the Sutras on the other hand, "the King's peace is recognised as infringed by crime." It might therefore be

reasonable to conjecture that the royal power of jurisdiction steadily increased. The reference in the Satapatha Brahmana to the King as wielding *Danda* confirms this supposition. * * Words which may in a manner correspond to plaintiff, defendant and arbitrator (or Judge) are found. The terms may refer to voluntary arbitration. Whether the King, presumably in conjunction with the Elders of the Tribe, was the chief civil Judge can only be a matter of conjecture. Mr. Jayaswal's view is contained in the following passage from his *Hindu Polity* :—'The Satapatha Brahmana starts the theory that the King should not merely protect the Law but himself administer it in person, or by his officers. The old theory has been that the law of the community was administered by the community.'

21. The Hindu King as Judge.

How exactly the King's role in the administration of justice was fitted into the pre-existing Hindu judicial machinery, it is not yet possible to say. Whether as a relic of the earlier system of Assembly-Justice or because of the mistrust of the unaided powers of the King to administer justice, it seems to have been an established principle of the early judicial system in this country that justice should never be administered by a single individual by himself. 'No decision shall be given by a person singly' (न एकाकी निर्णयं कुर्यात्) is a formula found frequently repeated in the Texts. Aristotle is said to have justified the Greek system of Heliasts—sometimes a very large number—on the

ground that as the supremely wise man is difficult to discover, several ordinary heads are better than one and that a multitude of men are less liable to corruption than a single individual. (Philipson, *Trial of Socrates*, 237).

Some of the early texts seem to treat the King's judicial work as standing almost on the same footing as his other public work and therefore to be discharged by him in the Sabha where he was surrounded by Ministers, Purohit, Sabhyas, etc. Thus Vasishta says: राजमन्त्रीसदः कार्याणि कुर्यात् 'Let the King or his Ministers (or the king taking Counsel with Brahmins) transact the business on the Bench.' (Buhler). In the Mahabharata, *Danda* is described as 'having many eyes' (नैकनयनः); Nilakanta explains this as follows: 'That in which are employed numerous instruments (eyes) for the perception of the truth; *viz.*, King, Ministers, Purohit and Assembly.'

बहूनि नयनस्थानीयानि राजामात्यपुरोहितपर्षदाख्यानि दर्शन-साधनानि यस्मिन्.

Manu says: 'When desirous of dealing with Vyavahara, the King shall in humility enter the Sabha with Brahmins and with Ministers who are skilled in Counsel.'

व्यवहारान् दिदृक्षुस्तु ब्राह्मणैस्सह पार्थिवः।
मन्त्रज्ञैर्मन्त्रिभिश्चैव विनीतः प्रविशेत्सभाम् ॥

Katyayana, describing the reward for the proper administration of Justice, couples the King with the Pradvivaka, Amatya (Minister) Brahmins and

the Purohit. I shall presently refer to the Pradvivaka and the Purohit in some detail. It is doubtful if the early texts contemplated an *official* court without the presence of the King. A text of Gautama refers to the presence of a Brahmin who can put questions to the Witnesses; but it rather reads as if it was meant to indicate a Brahmin sitting along with the King. Apastamba refers to Brahmins as giving decisions; but taking that sutra as a whole, it would seem to refer to private judicial bodies and not to a court sitting under royal authority. Manu and Yagnavalkya refer to the possibility of the King being *unable to attend*; in such circumstances, they provide for the King asking a learned Brahmin to take his place. It is only the later texts that contemplate *two* kinds of courts with official authority, called respectively *Sasita* and *Mudrita*, one presided over by the King and the other authorised by him (permitting the presiding officer to use the Royal seal).

As regards Kautilya's scheme, Mr. Jayaswal observes that he did not expect the King to take part in the administration of justice. In Books III and IV, which directly relate to Law and Justice, there is no reference to the King's participation. In Book I, ch. 19 (dealing with the duties of a King), the author uses language very similar to that found in some of the Dharma Sastras, as to the king entering the Court or Assembly (called *Upasthana* instead of *Sabha*) early in the morning and attending to various kinds of business. Mr. Monahan would prefer to translate *Upasthana* as 'Hall of Audience' instead of Court (L.B., 180) and he thinks that while there the King must have

attended to petitions from his subjects. The expression *Karyani pasyet* occurring in this context may signify 'administrative business; but the same expression is used in the Dharma Sastra books for 'Judicial business' also.

It is not improbable that in course of time the ruler ceased to take any personal share in the administration of justice, except in special circumstances. A text of Narada is understood by the Mitakshara as suggesting that even by the time of Narada the King's participation must have become the exception instead of being the rule. The Subodhini makes this clear, in the following words : " The author next proceeds to say that what Yagnavalkya regarded as only a secondary alternative was taken by Narada to be the normal course * * (after extracting the passage of the Mitakshara commented on, the Subodhini proceeds) the meaning is, as the King, because of his numerous pre-occupations, is not likely to have leisure and it is therefore proper that the determination of Law suits should be attended to as above stated by other persons representing the King, that itself is the primary and desirable alternative."

योगीश्वरोक्तमनुकल्पमेव मुख्यं मन्यते नारद इत्याह........राज्ञः बहुकार्यव्याकुलत्वेनावकाशाभावात् स्वप्रतिरूपकपूर्वोक्तपुरुषान्तरद्वारेणैव व्यवहारदर्शनस्योचितत्वादसावेव पक्षो मुख्यो ज्यायानित्यर्थः ।

A parallel may be found in the way in which the King in England gradually ceased to attend the sittings of The King's court.

22. Information furnished by the Dharmasutras.

Divergent views have been expressed as to the importance of the law of procedure in the early stages of legal evolution. One school of thought lays stress on the predominance of rules of procedure over rules of substantive law, to begin with. Sir Henry Maine (one of the leading exponents of this theory) observes 'the progress of most societies towards a complete administration of justice was slow and gradual. The State at first interfered rather to keep order and see fairplay in quarrels than took them into its own hands. * * Excessive technicality is characteristic of ancient law.' Anthropologists like Malinowski seem to think that this is not a correct picture of the state of things in primitive communities. Describing the position in England before the Norman Conquest, the authors of the History of English law say 'the very slight and inconspicuous part which procedure takes in the written Anglo-Saxon laws is enough to show that they are mere superstructures on a much larger base of custom. All they do is to regulate and amend in details now this branch of customary law, now another.' (P. & M. I, 27). This description seems fairly to summarise the place of the law of procedure in Ancient India.

The principal Dharmasutras contain only a few provisions which may be said to relate to judicial organisation or to adjective law. The earliest of them (Gautama), whose extant text is considered to be reasonably authentic and reliable, lays down the duty of the King to administer justice, punish the guilty and protect his subjects. There are a

few simple directions and a reference to justice being administered according to the Vedas, Upavedas, Dharmasastras and Puranas. (S.B.E. II, ch. xi). The portion grouped as chapter xiii begins with the declaration that in disputed cases, the truth has to be ascertained by means of witnesses. Then follow a few provisions about persons who can be witnesses and their obligation to speak the truth and some directions as to their examination. One significant passage says that witnesses may be examined by the King or by a Brahmin learned in the Sastras (chapter xiii, 26).

राजा प्राड्विवाको ब्राह्मणो वा बहुश्रुतः

The word 'Pradvivaka' occurring in this passage is taken by Dr. Buhler (just as in some of the other Sutras of Gautama) as an independent noun and is translated 'Judge'; but the commentator treats it as a verbal-noun standing in apposition or relation both to 'Raja' and 'Brahmin' and interprets the whole Sutra to mean that the King *can put questions* to the witness or a learned Brahmin may. In the Dharmakosa (I, p. 24), a passage said to be from Gautama is extracted from the Saraswativilasa and this makes mention of all the component parts of a Sabha which we find in the later Smritis (such as Purusha, Sabhya, Ganaka, Lekhaka, Pradvivaka, etc.). The footnote however says that the passage is not to be found in the extant Gautamasutra; and the Bhashya contains no comment on any such passage. In Sutras 27 and 31 of the same chapter, there is reference to *Pradvivaka* which is translated by Dr. Buhler as 'Judge'; but it is interpreted by

the Commentator as ' Vyavahara Drashta ' (which may mean a Judge or may only refer back to the King or Brahmin who according to Sutra 26 can question witnesses). Two Sutras in chapter xi (Nos. 12 and 22) require to be noticed here.

21. कर्षक वणिक् पशुपाल कुसीद कारवः स्वे स्वे वर्गे

22. तेभ्यो यथाधिकारं अर्थान् प्रत्यवहृत्य धर्मव्यवस्था ।

Dr. Buhler translates them as follows (S.B.E. II, 237).

'No 21. Cultivators, traders, herdsmen money-lenders, and artisans (have authority to lay down rules) for their respective classes.'

No. 22. Having learned the (state of) affairs from those who (in each class) have authority (to speak) he shall give decision (*he* in this passage refers to the King). The Bhashya interprets the Sutras somewhat differently :—It says, ' What is meant to be laid down is that if the King is unable to enquire, their own community must be asked (to enquire). It may be enough to have said *Swa varga* (once) ; the purpose of the repetition of the word *Swa* (in the sutra) was to show that the rule applied not only to the Karshakas, Vaniks, Pasupalas, Kuseethakaras, who are specifically enumerated in the Sutra but even to Brahmins etc. * * * It must be noted that if satisfaction (or satisfactory decision) is not obtained from the Community, the King may be approached. The next sutra provides how the King shall deal with the matter * * * The word Vyavastha (decision) is used in the (next) Sutra instead of merely using the word *Bruyat* (shall state) to indicate that in respect of what the King may then determine, there shall

be no review or modification. This reminds us that in respect of matters determined elsewhere (than by the King) there is scope for re-hearing '.

21. राजनि प्रष्टुमशक्ये स्ववर्गे एव प्रष्टव्यः इत्येवमर्थ उपदेशः.......स्ववर्ग इति वक्तव्ये वीप्सावचनं न केवलं कर्षकादय एव स्ववर्गे प्रमाणं किंतु ब्राह्मणादयोऽपीति........तत्राप्यपरितोषे राजसकाशं गन्तव्यमिति द्रष्टव्यम् ।

22. इदानीं यदि कर्षकादयो राजानमेव गच्छेयुः तदाकथं राजा परिच्छिनत्तीत्याह तेभ्य इति........ब्रूयादिति वक्तव्ये व्यवस्था-ग्रहणं राज्ञापरिच्छिन्नस्य पुनर्निवृत्तिर्माभूदिति एवं चापरितोषे अन्यत्र सिद्धस्यापि पुनः पुनः करणमस्तीति ज्ञापयति ।

This interpretation would impose on the communal bodies a judicial duty and not merely a duty to advise the ruler as to what the custom in their community is. This may perhaps better fit in with a state of things in which some kind of justice was being administered by such bodies, whether as Arbitrators or otherwise.

The Apastamba Dharmasutra, besides providing for the King punishing his subjects (other than Brahmins) after enquiry and careful investigation (by questions to witnesses or as the result of an ordeal) also contains the following provisions :— (5) Men of learning and pure descent who are aged, clever in reasoning and careful in fulfilling the duties, (of their castes and order, shall be Judges) in law suits. (6) In doubtful cases (they shall give their decision) after having ascertained (the truth) by inference, ordeals and the like (Means). (7) A person who is possessed of good

qualities (may be called as a witness and) shall answer the questions put to him according to the truth, on an auspicious day, in the morning time, before a kindled fire, standing near (a jar full of of) Water, in the presence of the King, and with the consent of all (of both parties and of the Assessors) after having been exhorted (by the Judge) to be fair to both sides. (S.B.E. II, 170). The word 'Judge' in the above translation has been inserted by Dr. Buhler; there is no word in the original corresponding to it. There is nothing in the Sutras themselves to indicate how the learned men there referred to acquired the authority to decide. In Sutra 7, the translation ,in the presence of the King' does not clearly bring out the significance of the original *Rajavati*. The commentator interprets it as 'in the Assembly presided over by the King' (राजाधिष्ठिते सदसि) Having the later Smritis in his mind, the commentator adds 'the reference to Raja brings in the Pradvivaka etc., as well'.

(राजग्रहणं प्राड्विवाकादेरुपलक्षणम् ।)

The word translated by Dr. Buhler as 'Assessors' is *Sabhyanam* (of the members of the Sabha).

The Baudhayana Sutra refers to punishment being inflicted by a King and to the examination of witnesses who were exhorted to speak the truth and threatened with punishments here and hereafter if they speak untruth. We find nothing more about courts and procedure except what is implied in Sutra 8 of I, x, 19. (S.B.E. xiv, 203) :—of injustice, one quarter falls on the party, one quarter on the witnesses, one quarter on all the Judges

and one quarter on the King' and Sutra 9 which frees King and Judges from all blame where a person is *justly* condemned. The word in the original corresponding to 'Judge' is *Sabhasadah*. (Those seated in the assembly). Whether in its authentic and complete form the Baudhayana Sutra could have given us fuller information, it is not possible to say. Dr. Buhler suspects that in its present form, the Baudhayana Sutra is on the one hand incomplete and on the other hand, it has received later additions. He winds up with the observation 'the greatest caution must be observed in using the Baudhayana Dharma Sutras for historical purposes'. (S.B.E. XIV, Intro. xxxv).

23. The Purohit and the Gramani as Judicial Officers.

At one time, the King's Purohit seems to have held a very important place not only in the King's household, but also in the public administration. In the Vedic Index,* it is stated 'the Purohit is in all religious matters the *Alterego* of the King. In historical times, he represented the real power of the Kingship and may safely be deemed to have exercised great influence in all public affairs, such as administration of justice and the King's conduct of business.' A text of Vasishta prescribes for the Purohit a more severe penance than that prescribed for the King, when they improperly punish any person or improperly acquit one. Some verses of Vyasa would suggest that the Purohit was to act as Pradvivaka when the King attended to judicial work. Other texts (*Cf.* Kat. 56) refer to the Pradvivaka and the Purohit

as two independent figures in the Sabha, while several texts recognise that any learned Brahmin (and not necessarily a Purohit) may be Pradvivaka. Kautilya attaches great importance to the office of the King's Purohit (Book I, ch. ix). He provides for the Purohit a salary equal to that paid to the Minister, to the Commander of the Army, to the Heir-apparent, to the Queen and to the Queen-mother. (Book V, ch. III). He advises that the Purohit and the Prime Minister should be employed to test the fidelity and honesty of Ministers and other high public officials including those who are to be appointed Judges. (Book I, ch. X). But the Arthasastra does not directly connect the Purohit with judicial administration. As few of the Dharmasastras give the Purohit any prominence in this connection, it may be reasonably assumed that at a comparatively early stage, he ceased to be associated with the administration of justice. In the Adhyatma Ramayana (Ayodhya II, 228) Vasishta is made to say 'I know that the Purohit's profession is a despicable means of making a living.'

पौरोहित्यमहं जाने विगर्ह्यं दूष्यजीवनम् ।

This is very different from the tone of Vasishta in the Valmiki Ramayana ; the passage is significant as showing that in mediæval India, the office of King's purohit must have lost all importance.

During the Vedic period, the *Gramani* who, to begin with, was probably elected seems to have also been connected with the settlement of disputes and the prevention and punishment of crime. The Vedas refer to a Gramyavadin who is regarded by

Macdonell and Keith as a village Judge and also to his Sabha. The *Jataka* stories refer to the judicial powers of the village headman (Grama Bhojaka) exercised by himself or in conjunction with the villagers. He seems to have had power to punish criminals except in serious cases. (Maj. p. 62). Though the Manusmriti refers to a Gramika or Gramadhipati, he does not seem to continue to retain his original importance.

24. Why Adjective Law Scanty in the Dharmasutras.

It has been stated above that the Dharmasutras give us only very scanty information as to the nature, constitution and working of the judicial bodies of the day. By way of explanation, Dr. Buhler has suggested 'a general principle' underlying the composition of the Dharmasutras, in the following words :—'Those points only fall primarily within the scope of the Dharmasutras which have some immediate close connection with Dharma (the acquisition of spiritual merit). Hence, it sufficed for them to give general maxims for the fulfilment of the Guna Dharma of Kings, the impartial administration of justice and to give fuller rules regarding the half religious ceremony of the swearing and examination of witnesses. Judicial technicalities like the determination of the legal value of written documents had less importance in their eyes and were left either to the Desa Achara (Custom of the country) or to the Neeti and Artha Sastras.' (S.B.E. XIV, Intro. xxvi). The first alternative is by no means improbable. Administration of Justice by Sabhas, (whether with or without the King), had as already

stated been in vogue from Vedic times and some well established practice in relation thereto must have grown up. As observed by Dr. Jolly, in another connection, a great many floating proverbs and authoritative enunciations of Vriddhamanu or Brihanmanu must have existed in the land. Even the Manusmriti cannot be said to contain much of adjective law: Out of about 120 verses devoted to procedure in chapter viii, nearly one half (versus 61-123) relates to witnesses, their obligation to speak the truth, the exhortation to do so, and punishment for failure to speak the truth—topics to which attention has been devoted in the early sutras also. The opening slokas of Manu, Ch. VIII only dilate on the duty of the King and the members of the Sabah to see that justice is done; and after some intervening slokas relating to ownerless property, lost goods and treasure trove, there follow a few provisions relating to a creditor's suit for money. The author who makes elaborate provision for so many topics of substantive law and contemplates determination of disputes by the King's Sabha could not have imagined that the meagre provisions above referred to were all that were required by way of procedural law for the determination of those disputes. Yagnavalkya, though fuller than Manu, assumes (as pointed out in the Mitakshara) that many rules being Artha Siddha (implicit in the nature of the thing) need not be expressly formulated.

The second of the alternatives suggested by Dr. Buhler, namely, probable treatment of the subject by the Neeti or the Arthasastras, requires some examination, as this is in substance the same

as Mr. Jayaswal's theory already referred to. Of the early Arthasastras or Neetisastras, Kautilya's is the only one now available ; and it may be useful to compare the scheme of its 'Law' section with the scheme of the corresponding sections in the early Dharmasutras on the one hand and in the extant Manusmriti on the other. We are not here concerned with the relative merits of the rules of substantive law as enunciated in the two sets of books. Books III and IV of Kautilya are usually regarded as relating to Law. Book IV headed 'Kantaka Sodhana' (literally, removal of thorns) deals mainly with administrative or quasi-judicial measures bearing on the prevention or suppression of crime. In the words of Monahan, it mixes up in a confusing manner regulations for Police and public safety, criminal procedure and punishment for petty as well as serious offences (L.B. 110). Its principal headings are, Protection of Artisans and Merchants, suppression of the wicked living by foul means, detection of youths of criminal tendency, seizure of criminals, examination of cases of sudden death, punishment for certain kinds of crime and some hints as to trial of offenders, obtaining confessions, etc. A strong monarchy like the Mauryan, governing on the lines represented by Chanakya's school of politics, may have exercised powers of the kind above referred to : it is hardly to be expected that the State as it was in the days of the early Dharmasutras could have exercised any such powers and one cannot reasonably expect any works of that period to provide for them. Even in the advanced law books of Narada and Brihaspati, one does not

find corresponding provisions. It is noteworthy that in slokas 252 and 253 of Manu, Ch. IX, the terms Kantakoddharana and Kantakasodhana are used, but the provisions in that context are little more than amplifications of the law of theft found in the early Dharmasutras.

Of Book III of the Arthasastra, the greater portion deals with substantive law, both civil and criminal. Though some of the headings in that section correspond to some of Manu's 'eighteen topics of Law,' there is not such a degree of resemblance between the two schemes as to warrant the inference that Manu must have derived his arrangement or even the substance of chapters VIII and IX from Kautilya. Many of the topics treated of in these two chapters of Manu, *e.g.*, inheritance, marriage and sonship, loan, pledge, deposit, surety, theft, abuse, assault and adultery will be found touched on, though only lightly, in Gautama. The rules of judicial procedure constitute only about two-thirds of chapter I of Book III of Kautilya. They are no doubt important so far as they go; but many of them might well have remained matters of practice, resting on convenience and good sense, in the earlier period. It is not without significance that few of these rules of procedure have been reproduced in the Manusmriti. What is more important still is that the Arthasastra scheme of Courts is different from that of the Manusmriti; and it is the latter that is adopted by Narada, Brihaspati and Katyayana. The Arthasastra does not seem to attach much importance to the various *popular tribunals*. It provided for administration of justice by King's courts appointed in the *Sangrahana*

(a group of ten villages) the *Dronamukha* (400 villages) and the *Sthaniya* (800 villages) and places where districts met ; the Courts were to consist of three *Dharmasthas* (men acquainted with the sacred law) and three *Amatyas* (Ministers of the King)—See the opening sentence of Book III, Ch. I. Commenting on this provision, Monahan says : ' It is obvious that a Court composed of three Ministers who were members of the King's executive council could not have been held at every place where there was a fort of any kind. Possibly only one or two such Courts may have been contemplated * * A more probable conjecture seems to be that the word *Amatya* may have had a second extended sense, covering a large class of subordinate officials and that courts of different grades for adjudicating cases relating to trade or business, or arising out of contracts, were established in large and small towns, each such court being composed of three *Amatyas* holding office of *Dharmastha* ' (L.B. 89, 90). The Manusmriti and, following it, the Smritis of Yagnavalkya, Narada, Brihaspati and Katyayana continue the *Sabha* system which seems to have been in vogue from Vedic times. In verses 115 to 117 of Ch. VII the Manusmriti provides for the appointment by the King of a Headman for each village and headmen over groups of villages, and directs that ' the Governor (headman) of the village shall try all cases of offence occurring therein. Cases which he is not able to decide, he shall refer to the Governor (headman) of ten villages. In cases of doubt or incompetency, the head of the ten villages shall refer to the head of twenty villages and the latter

to the head of 100 villages, and he too, under similar circumstances, to the head of 1000 villages. This is apparently a jurisdiction limited to the trial of crimes. In the Cambridge History of India, (I, 485) it is generally stated (as gatherable from various sources) that cases were commonly disposed of locally, by reference to Panchayats permanent or constituted *ad hoc*, or by officials of various grades, and there was a system of appeals as far as the King. Whether and to what extent the Kautilyan system of courts came into general vogue, it is not possible to say. It is not unlikely that official or professional courts of that kind, during such time as they continued to work, gave some measure of definiteness and complexity to rules of procedure as compared with the informal ways of a popular court (as the earlier judicial bodies must have been). But the rules of procedure found in Narada, Brihaspati and Katyayana need not have been adopted from Kautilya. They show a great advance even upon those found in Kautilya's Arthasastra. The advance may in part be attributable to the contemporaneous development of the Nyaya Sastra (Science of Logic) whose influence is clearly traceable particularly on the rules of pleading. The advance must mainly have been the result of practical experience in the working, for some centuries at least, of an efficient system of judicature in a well organised state.

25. Hindu Speculation as to the Origin of Vyavahara and Danda.

It will be interesting to see how the pre-historic state of things was accounted for when the authors of the Dharmasastras began to speculate on the origin of political and legal institutions. Narada declares that in ancient times people were truth—speaking and devoted to Dharma and there was no litigation because there was no hatred or envy.

Litigation (Vyavahara) resulted when Dharma was no longer followed ; and the King was created to attend to Vyavahara and wield the Danda. Brihaspati repeats the same idea, substituting covetousness (Lobha) for envy. Manu states bluntly that a man honest by nature is very rare and hence the need for law. (M. VII, 18 to 24). The assumption of the prevalence of a golden age in the past is not unknown to western political speculation ; on the other hand, the Matsya-Nyaya (the doctrine of the bigger fish devouring the smaller fish) referred to by Manu and others as characteristic of the degenerate age bears a striking resemblance to the description by Hobbes of the condition of mankind in the state of Nature, *i.e.*, before Civil Society was constituted. That the speculation as to a stage when no resort to the law courts was necessary has an element of truth in it is confirmed by the following observation of Loria (*Economic Foundation of Society*, quoted in *Evolution of Law*, III, 235 to 238) :—' Necessity for sanction becomes greater with the growth of economic inequality. Where that was not the case, the law will simply consist in the theoretical affirmation of the rights and duties of the individual. Once

economic inequality sets in, it is to the interest of those who possess less to usurp the rights of those who possess more, and those who labour without receiving an adequate redress have everything to gain from violating the law. * * * There is thus nothing extraordinary in the fact that the primitive tribunals were simply Courts of arbitration which left their verdict to the voluntary execution of the party.' He adds that every nation must undergo a change in its legal system when the onward march of its civilisation has brought about radical changes in its economic organisation.

Apart from the truth or otherwise of the speculation of Narada and Brihaspati as to the origin of Vyavahara, their way of stating it had important practical results.

I. If hatred and envy or hatred and covetousness are the root of the trouble, the king's duty will not be discharged merely by compensating the victim; he must see to the observance of Dharma. Danda which is extolled and almost deified in the Dharma Sastra literature is derived from *Dama* meaning 'to restrain.' The Sukraniti says 'Damana is weaning away from wrong conduct; this is achieved by punishment. The means by which a person is thus restrained (from misconduct) is Danda.'

निवृत्तिरसदाचाराद्दमनं दण्डतश्च तत् ।

येन संदम्यते जन्तुरुपायो दण्ड एव सः ॥

Gautama places Danda and teaching by the Acharya or Preceptor on an equal footing, as reforming or corrective influences. Once it is

understood that the reformation or correction of the transgressor was deemed to be as important as punishing him or compensating the victim, the place of penances and expiations in law will become intelligible in respect of a community that believed in their efficacy. The following Sutras of Apastamba, though dealing with Brahmins, clearly reveal the scheme. "If those who have had the sastraic samskaras fall from the proper standard of conduct by reason of their weakness, the Acharya will prescribe the appropriate prayaschitta ; if the delinquent does not obey, the matter will be referred to the king who in turn will refer to his Purohit versed in the Dharmasastra and the Arthasastra. He will prescribe the punishment (other than corporal punishment and servitude) ; The culprit if still disobedient will be subjected to Niyama (Fasting, restraint, etc.) according to his capacity till he agrees to perform the expiation"

शास्त्रैरधिगतानामिन्द्रियदौर्बल्याद्विप्रतिपन्नानां शास्ता निर्वेदमुपदिशेद् यथाकर्म यथोक्तं तस्यचे च्छास्त्रमतिप्रवर्तेरन्राजानं गमयेत् । राजा पुरोहितं धर्मार्थकुशलं ब्राह्मणं नियुंज्यात् । बलविशेषेण वधदास्यवर्जं नियमैरुपशोषयेत् । (Dharmakosa I, 568, 569).

In describing the King's duty, Yagnavalkya and Narada use the expression स्थापयेत्पथि 'put him back on the right path,' which the Mitakshara interprets as follows : 'having punished (a person) according to the nature of the wrong, the King must re-establish the person in the performance of Swadharma.

राजा यथापराधं विनीय दण्डयित्वा पथि स्वधर्मे स्थापयेत् ।

The Arthasastra also, from its own point of view emphasises the importance of Danda, though Kautilya advises moderation and due consideration in the award of punishment.

II. From at least the time of Gautama, Vyavahara is classified under two heads (Dvirutthana) described later as Deyanibandhana and Danda nibandhana or Dhanamula and Himsamula. The category of Dhanamula will be seen to be the result of Lobha (covetousness) and that of Himsamula to be the result of anger or enmity or Kama (desire) and Krodha (anger) as some writers say. This division does not exactly correspond to the division of law into civil and criminal ; but those who criticise the early Hindu Law as not recognising the distinction between Civil and Criminal matters ignore the higher basis on which the administration of justice was sought to be rested by the Hindu Lawyers.

III. It has already been mentioned that Writers on the Evolution of Law have sometimes stated that rules relating to procedure and forms of action were the most prominent in early law and the rules of substantive law were evolved only through the expansion of adjective law. This view is the result of limiting their observation to the History of the Roman Law and of the English Common Law. This does not appear to have been the course of development of the Hindu Law. The Smritis assume that every deviation from Dharma, if brought to the notice of the King, will be appropriately dealt with by him. This is the logical consequence of the Hindu outlook which lays more stress on the *duty* aspect of each situation than on

the aspect of *right*. The question is not so much whether *A's* right having been violated, he is to have a remedy or not ; it is rather whether *B* having failed in his duty, he should not be compelled to fulfil that duty. There are no doubt provisions limiting the cases in which the king can take cognizance on his own initiative or on that of his officers, and insisting that in other cases he can act only if and when moved by or on behalf of the injured party. The object of these provisions was not to restrict the cases in which the party wronged could seek redress but to prevent needless interference by the King or his officers merely out of a desire to add to the Revenue or to satisfy any indirect purpose. The classification of the main topics of law into Eighteen Titles is not also a restrictive provision. By using the word *Bhuyishta* (mostly) Manu himself recognised that the enumeration was not exhaustive. Narada and the later Smriti writers expressly stated that the sub-heads of conceivable legal disputes could be innumerable.

26. The King's Residuary Powers and Responsibilities.

In the Dharma Sastra scheme of judicial organisation, the Pradvivaka is the most important figure in what may be called the King's justice, *i.e.*, justice administered by or under the authority of the King. Before proceeding however to deal at length with the Pradvivaka and the Sabha over which he presided, it may be convenient to refer to a few more provisions relating to the place of the King in the administration of justice. The later Smritis contain interesting provisions as to the relative powers and responsibilities of the different

categories of persons composing a Sabha. Brihaspati speaks of the King, as Vakta, Adhyaksha and Sasta. The first two roles he fills, when he happens to be present in the Sabha. As regards the third role, the texts make a distinction between various kinds of punishment. In the absence of the King, even the Pradvivaka can inflict Vagdanda (admonition) and Dhigdanda (rebuke). But the king alone can inflict Artha danda (fine) and Vadha danda (Corporal punishment). An extreme view that the infliction of punishment was the prerogative only of the ruler but subject to certain limitations seems to have at one time prevailed among the Lichchavis. Quoting from one of the Buddhist books Dr. Majumdar says : "A criminal was at first sent for trial to the officers called 'Vinichchiya mahamatta.' If they found the accused innocent, they acquitted him ; but, if he was guilty in their opinion they could not punish him but had to send him to the next higher tribunal, that of the 'Vohārikas'. They too could acquit the accused if they found him innocent, but had to send him to the next higher tribunal, *viz.*, that of the Suttadhara if they considered him guilty. There were three other tribunals with similar functions, *viz.*, those of Atthakulaka, Senapati, and Uparaja each of which would acquit the accused if innocent, but had to send him to the next higher tribunal if found guilty. The last tribunal, *viz.*, that of the Raja had alone the right to convict the accused, and in awarding punishment he was to be guided by the 'Paveni pustaka' or the Book of Precedents. He could be punished only if seven successive tribunals had *unanimously*

found him guilty, and he was quite safe if but one of them found him innocent (Maj. pages 95, 96).

When a matter was dealt with by the Sabha in the presence of the King, he was ordinarily expected but was not bound to accept the opinion of the Sabha and of the Pradvivaka. As an appellate authority, the king had a special position. About the general nature of appellate jurisdiction in Hindu procedure, I shall make some observations later on. Where miscarriage of justice had taken place or was alleged to have taken place before the Court, the King had a threefold responsibility :—(*a*) he had to look into the matter himself and give redress to the aggrieved party. (*b*) he had to punish the officers and Sabhyas responsible for the miscarriage of justice and (*c*) if a suitor made an unfounded allegation that justice had not been done to him, the king must punish him.

The general theory of the king's duty to protect his subjects involves the recognition of a kind of residuary or miscellaneous jurisdiction in him—somewhat on the analogy of the King being *Parens Patriae.* The miscellaneous jurisdiction—so called because it is not comprised in the regular Vivadapadas (titles of law) is discussed under the head of Prakirnaka, in the sanskrit books. Manu, following the earlier Sutrakaras, lays upon the King the duty of protecting the estates of infants and other persons unable to protect their own interests and of safeguarding the properties of deceased persons till the heir (especially when he is absent) appears and takes charge (M. VIII, 27 and 30) Kalidasa refers to this duty in the *Sakuntalam* (Act VI) in the following poetic terms : ' Whichever

dear relative any subject happens to lose, King Dushyanta will fill that person's place except where it will be sinful to do so'

येन येन वियुज्यन्ते प्रजाः स्निग्धेन बन्धुना। स स पापादृते तासां दुष्यन्तः—

The commentator refers this sentiment to the Nitisutra that the King will always act as a parent.

सर्वत्राघोपहतात्पितेवानुगृह्णीयात्।

The importance attached to the duty of protecting the estates of helpless women is shown by the provision in Manu that the king shall punish (like thieves) such of their male relatives as may attempt to rob or cheat them. (M. VIII, 29). In another verse, Manu directs the King to recover from thieves all articles they have stolen and make them over to the owners. (M. VIII 40). There are similar provisions in the other Smritis also. To make this direction effective, it has been the law even from the days of Gautama that in default of the king or his officers recovering the stolen properties from the thief, he should compensate the owner from his own treasury.

27. Courts According to the Later Smritis.

The later Dharma Sastras classify courts in various ways. The supeior courts (Sreshta Nirnaya Sthana as the Smritichandrika calls them) are those which are presided over by the King himself or by a Brahmin (Pradvivaka) authorised by the King to act for him. In both cases, the court is

a *Sabha i.e.*, a composite body, whose component elements are the Pradvivaka (with or without the King), the Sabhyas, the Sabhasads, the Ganaka, the Lekhaka, and the Purusha. The Smritichandrika states the result of the texts to be that the King attending the Sabha can personally act as a Judge only if he is a Kshatriya, otherwise he must associate a Brahmin with himself. The inferior courts (Jaghanya Nirnaya Sthana as the Smritichandrika calls them) are enumerated by Bhrigu.

आरण्यास्तु स्वकैः कुर्युः सार्थिकास्सार्थिकैस्तथा । सैनिकास्सैनिकैरेव ग्रामेष्युभयवासिभिः । उभयानुमतं चैव गृह्णते स्थानमीप्सितम् ॥ कुलीकास्सार्थमुख्याश्च पुरग्रामनिवासिनः । ग्रामपौरगणश्रेण्यश्चातुर्विद्यश्चवर्गिणः । कुलानिकुलिकाश्चैव—Dh. K. I. p. 55.)

Commenting on Bhrigu's verses, the Smritichandrika says that the first five tribunals are intended for the particular groups of people *viz.*, Foresters etc. In disputes between villagers, the decision must be given by their neighbours. The remaining ten tribunals beginning with the village courts are ordinary tribunals. The language in which these verses are introduced in the Madhaviya shows that the superior courts (as was only to be expected) were situate near the King's residence.

राजगृहसमीपवर्तिनः सभास्थानान्मुख्यादन्यान्यमुख्यान्याह भृगुः ।

The Vyavaharodyota, commenting on these verses, introduces the further limitation that the first five tribunals decided only particular kinds of dispute or were tribunals for each individual

case whereas the rest were tribunals of general jurisdiction.

आरण्यकादीनां पञ्चानां तत्तत्कलहनिर्णयस्थानत्वं....ग्रामादि दशानां तु सकलनिर्णयविवादस्थानत्वम् ।

Brihaspati also refers to these courts of Aranyas Sainikas, and merchants and to courts known as Kula, Sreni, Gana, etc., and he adds that Kula, Sreni, Gana etc. have no jurisdiction to deal with *Sahasa* (acts accompanied by violence). Another verse (Dh. K. II, p. 874) however refers to their power to punish Papakarma (Sinful acts) and the punishments permitted are Vagdanda (admonition) Dhigdanda (rebuke) and Parityaga. Apararka interprets the last word as excommunication, (Asamvyavaharyatha) but the Smritichandrika takes it to mean Branding (Anka Karana) or even banishment (Pravasana). A passage quoted in the Dharmakosa (I, p. 26) from Sankhalikhitha recognises the jurisdiction of leaders or elders in Gana Samaya, Sreni, and Puga but excludes cases of treason (Rajadroha) from their cognisance. Narada also refers to the courts described as Kula Sreni, and Gana and Katyayana gives a longer list which includes Puga, Vrata, Nigama and bodies of other special community or occupational groups. Another passage quoted in the Dharmakosa (I, p. 64) as from Vyasa refers even to the old partriarchal jurisdiction of father, grandfather and other family elders.

The enumeration of these inferior courts is of some historical significance. The natural course of evolution would have been for the local or

popular tribunals to have begun to function in the first instance and the superior courts must have been introduced at the top of the system, with the establishment and growth of royal authority. And, as the Sabha represented a well known institution in the land, the same composition seems to have been adopted for the superior courts as well, especially as that was the best way to secure the co-operation of the Kshatriya and the Brahmin representing authority and learning respectively. In view of the difficulties of communication in ancient times, few disputes could have been carried to the superior courts and to the headquarters of the king ; hence the persistence and vitality of the system of village autonomy in the country. As already explained, the administration of justice in the village itself went back to the Vedic periods.

Dr. P. N. Sen speaks of these 'local courts' as having a 'sort of delegated authority within their spheres' (Hindu Jurisprudence, p. 363). If he meant authority delegated by the *king*, the assumption would not be correct, at any rate in respect of the earlier period of their existence. If I do not pause here to deal at some length with the variety of popular or local bodies that administered justice in this country, it is not because I underrate their role or importance, but only because this part of the subject has been fully dealt with by Mr Jayaswal, Dr. Radhakumud Mukerji and other historians (Jayaswal's *Hindu Polity*, Ch. XIII ; Dr. Mukerji's *Local Government in Ancient India*, pp. 29 to 34 and again pp. 132 to 142 ; Kane, *History of the Dharma Sastras*, Vol.

II, pp. 66, etc., also by Dr. S. Krishnaswami Aiyangar, Dr. Minakshi, Dr. Altekar and Mr. Nilakanta Sastri) I accordingly content myself with referring now and then to some features of the system. Relying on a passage from the Sukraniti, Dr. Mukerji observes 'the principle underlying these lower and local courts is that in cases of dispute, the best men of the locality concerned, can alone be the proper Judges' (L. G. 135.). I will only take leave to remark that institutions generally come into existence in the natural course of historical evolution and according to practical exigencies ; and the justification or explanation therefor on grounds of principle is realised and formulated only later.

Another classification of courts (according to Brihaspati,) is into, Pratishtita, Apratishtita, Mudrita and Sasitha (or Sastrita). The Smriti itself explains these terms ; that which exists in a fixed place, whether town or village, is Pratishtita : this suggests that by Brihaspati's time, such courts must have come into existence. A court which may sit in any place, according to circumstances, was Apratishtita ; the comment of the Smritichandrika on this passage suggests that this category relates to the courts for the Aranyas, Sarthikas, and Sainikas referred to in Bhrigu's enumeration. It further appears that the Pratishtita and the Apratishtita courts were not courts constituted by the King but were brought into existence by the parties. Mudritha was the court over which a Judge (Pradvivaka) deputed by the King presided, and Sasitha (or Sastrita) was one over which the King himself presided. The term Mudrita is

significant as showing that when the Pradvivaka presided, he had charge of the royal seal or ring to be used in summoning the defendant and probably also for authenticating the proceedings of the Court. As only the king had power to inflict punishment and the Pradvivaka had a limited power in this behalf, but neither of them sat in the Pratishtita or Apratishtita courts, the Smriti-chandrika draws the inference that these two courts can only give a decision but not pass a sentence or a decree for money and that in *Sahasa* cases they cannot even give a decision. A verse of Brihaspati (which I cite elsewhere) says that Kula, Sreni, Gana, etc. can inflict Vagdanda, Dhigdanda and Parityaga.

28. Gradation of Courts.

The importance of the classification of judicial bodies above referred to lies in the enunciation of a rule in respect of their *relative* authority. Speaking of the local courts of mediæval England, Sir W. Holdsworth says : 'Under early systems, the jurisdiction of the lower Courts was not as in the present day less extensive than that of higher Courts. They were all courts of general jurisdiction. But a person went to the County Court if he could not get justice in the Hundred Court and if he could not get justice in the County Court, he brought his case before the King and Witan' (H. E. L. I, p. 9) The position was much the same in the Ancient Hindu system. As I have already indicated, there were however one or two restrictions on the powers of the local courts. The principle of "Gradation of courts" is definitely enunciated for the first

time only in Yagnavalkya, where after enumerating the King's court, Puga, Sreni and Kula, it is said that in the matter of deciding disputes 'each previous one is superior (Guru) to the succeeding.'

नृपेणाधिकृताः पूगाः श्रेणयोथ कुलानि च ।
पूर्वं पूर्वं गुरुज्ञेयं व्यवहारविधौ नृणाम् ॥

(Yag. II, 30). A similar passage is found in Narada substituting Gana for Puga. Brihaspati and Pitamaha in a similar context speak generally of 'decisions of Kula, etc.' without enumerating the popular courts in detail. Pitamaha has another sloka to the effect that what has been heard in the village may go to the town and what has been heard in the town may go to the King.

ग्रामे दृष्टः पुरं यायात् पुरे दृष्टस्तु राजनि ।

This however is a stray text of which the context is not available. It is therefore not easy to say what was meant by Grama and Pura.

The effect and the implication of this declaration of relative superiority as between different courts, I shall discuss more fully, when dealing with the subject of finality and appeal. The declaration definitely brings the local courts into a kind of mutual relationship and (what is more important) into a kind of subordination to the King's Court, thus recognising the principle that the king is the fountain of justice. The Sutras and the earlier Smritis, though they threw on the king the obligation to administer justice and protect his subjects, did not enunciate anything like the above general rule.

The Arthasastra of Kautilya provides for courts constituted by the Ruler but makes no reference to any relation between such courts and the popular or local tribunals. Nor does it contain anything in the nature of a provision for appeals from one Court to another. The Manusmriti directs the king to respect the Dharma (or rules) of Jati, Sreni and Kula (M. VIII, 41); but it makes no reference to adjudications by such bodies. There is a general provision in Ch. VIII, 117, for a decision obtained by false evidence being vacated—presumably by the very Court which gave it. The only provision for an appellate decision contained in Manu is that in Ch. IX, 234, but that relates to erroneous decisions given by Ministers and the Pradvivaka which the King is authorised to set right. I have already referred to the provisions of Manu VII, 116 and 117 according to which there is some gradation in respect of the trial of offences as between Heads of villages and heads of ten, twenty, hundred, etc., villages respectively. But these are all royal officials. When exactly the relation between the popular tribunals and the king's Court which Yagnavalkya's passage postulates came about it will be interesting to know, but it is not possible to state.

An interesting extract given in the Dharmakosa (I, p. 41) from the Vyavaharaprakasa of Mitramisra is worth noting. He starts an objection 'how could there have been any occasion for the Puga, Sreni and Kula to pronounce a decision at all? They are not royal courts and they could have no independent jurisdiction.' To this he gives a half-hearted answer, referring to the

possibility of their deciding disputes between merchants, etc. The Vyavaharodyota seems to imply that these Courts must have been authorised by the king and it even looks as if, as a matter of grammer, the author would take the opening words 'Nripena Adhikritah' in Yagnavalkya's verse as qualifying even the words referring to the local courts. But the Mitakshara commentary and the corresponding verses in Narada, Brihaspati and Katyayana make it clear that that could not have been the meaning intended. The Mitakshara interprets 'Nripena Adikritah' as a substantive expression referring to the Pradvivaka's sabha and not as an adjective qualifying the succeeding words. It takes the sloka to refer to four courts, which will not be possible if 'Nripena Adikritah' in the verse is read as adjectival. In Narada, Brihaspati and Katyayana, *Nripa* is used independently and as a nominative by itself.

Speaking as a democrat, Dr. Mukerji suggests that the gradation of the several popular Courts 'was determined by their numerical strength and the degree in which they represented the various interests, classes or castes in the community concerned.' (L.G. 135). But this does not appear to be the orthodox theory. Brihaspati suggests and Mitramisra is glad to adopt the suggestion that the relative impartiality and intellectual capacity of the persons constituting these various courts must have been the basis for this kind of gradation. (See Dh. K. I, page 54, See also the Extract from Medhatithi on page 42 of the same book). The Subodhini, commenting upon Yagnavalkya's text, says 'the King is regarded as superior in the

matter of decision of disputes because he is strong and able to attend to them ; other (tribunals) are superior or inferior according to their relative strength or capacity.'

नृपेाहि बलवान् व्यवहारङ्कारयितुं समर्थः इति व्यवहारविधेा स एव ज्यायान् इतरे पिसामर्थ्यापेक्षया दुर्बलावलीयांसश्च भवन्ति ।

It is not clear whether the *Samarthya* (ability or capacity) referred to in this passage is coercive power (or authority) or intellectual capacity. In respect of Grama, Sreni, Gana, etc., Katyayana speaks of *Karyachintakas* (secretaries) and declares their qualifications in the following words : ' Pure, conversant with Vedic Dharma (or Veda and Dharma) clever, self-controlled, well-born, of all-round capacity, not covetous, aged and noble.'

शुचयो वेदधर्मज्ञाः दक्षादान्ताः कुलोद्भवाः सर्वकार्य प्रवीणाश्चालुब्धाः वृद्धामहत्तराः ॥

So, it cannot be that, even these private Judges were not qualified men. Another text of Katyayana says : ' Those who attempt to decide disputes when not authorised (or asked) to do so are arrogating royal functions to themselves and they must be punished.'

अनिर्दिष्टाश्च येकुर्युः व्यवहारविनिश्चयं ।
राजवृत्तिप्रवृत्तास्ते तेषां दण्डं प्रकल्पयेत् ॥

It is not clear whether this text intended to declare that *all* judicial authority must be derived expressly or at least by some kind of implication *from the ruler*. Some at any rate of these passages may represent a growing tendency to bring the

administration of justice wholly under royal authority if not also to officialise the whole judicial administration. The weakening of the royal authority in mediaeval India apparently prevented further development in this direction.

In a footnote on page 6 of the translation of Narada (S. B. E. XXXIII) Prof. Jolly refers to Kula, Sreni, and Gana as 'stages of private arbitration.' This description is apt to mislead a modern reader. These tribunals were private in the sense that they were not constituted by royal authority and they resembled arbitrators to that extent. Commenting on the text of Brihaspati (which classifies courts into Pratishtitha, etc.) the Smritichandrika explains: 'The Pratishtitha and the Apratishtitha tribunals are to be constituted at the instance of the parties themselves, by their request and payment of remuneration, these Courts not being constituted by the Sastras or by order of the King. The Mudrita and the Sastrita are brought into existence by the King, by virtue of his authority. The parties have only to approach these tribunals and they have not got to bring them into existence.'

प्रतिष्ठिता प्रतिष्ठिता च सभा निर्णयार्थिभिरेव प्रार्थनार्थ दानमाननादिभिः कार्याशास्त्रप्रयुक्त्या नृपप्रयुक्त्यावास भासिद्धयभावात् मुद्रिताशासिता च स्वाधिकारवशाद्राज्ञैवक्रियते तेन तत्र निर्णयार्थिनां तत्समीपगमन मेव नतु सभाकरणम् ।

Whether a villager could have resorted directly to the King's Court without even making an attempt to get justice from the popular courts, it is difficult to say. Visvarupa says: 'It is to be noted that

in respect of disputes, the King can be approached *only* in the order of Kula, etc."

कुलादिक्रमे णैव व्यवहाराणां राजागामिता द्रष्टव्या ।

(Dh. K. I. 41).

The Particle *Eva* (only) in the above passage suggests that the suitor *must* go through the local courts before he can approach the King. If this be so, can these tribunals be regarded as private tribunals or mere arbitration bodies in the modern sense? The recognition of a suitor's right to carry before the King any matter that has been decided by these local tribunals links them up with the regular judicial system of the land.

In his Summary of Hindu Courts, Mr. Colebrooke has included a category of 'Inferior Judges appointed by the sovereign authority for local jurisdictions' (See Misc. Essays II, page 491; see also the note printed as appendix B to Strange's Hindu Law, p. 321). He further says: 'From their decision an appeal lies to the Court of the Chief Judge and thence to the Rajah or King in person.' I have not been able to trace any clear reference in the texts to this category of Courts. One of Brihaspati's texts refers to Niyuktakas and another to Sabhyas. If both these words refer only to the members of the Court over which the Pradvivaka or King presided, there will be no Court of inferior judges; but the language of some commentators suggests a different view. In an earlier verse which excludes *Sahasa* from the jurisdiction of the inferior Courts, there is found the expression Kula, Sreni, Gana *adayah*. The *Adi* at the end of the expression is taken by the Vyava-

harapraksa to refer to Sabhyas, presumably as a separate entity. The Dandaviveka (p. 16) states that the introduction of Sabhyas between Gana and Adhikrita (which means Pradvivaka) implies that in the case of Sahasa even these persons must where they feel doubts leave the decision to the King. The sense of this observation is not very clear. From later practice, there is reason to think that in the *districts* there used to be Judges appointed by the sovereign. This must have happened when the judicial machinery provided by the texts for a state of a small size was sought to be adapted to larger states. By this time, however, the idea of the composite court (associating Sabhyas with every Court) seems to have been departed from. In the Muslim regime, Hindu Pandits seem to have been appointed to advise the Qadi on matters of Hindu Law whenever Hindu subjects chose to resort to the Courts instituted by the Muslim rulers.

Of the Puga, Sreni, and Kula, Mr. Colebrooke says they are 'different degrees of Panchayati which, as is apparent, is not in the nature either of a jury or of a rustic tribunal but merely a system of arbitration subordinate to regularly constituted tribunals or courts of Justice.' He attributes the decay of this Panchayat system to a Bengal Regulation of 1781 which deviated from the Hindu system by insisting on proof of partiality or gross corruption on the part of the panchayatdars before their award can be set aside. Henceforth every dissatisfied party set out calumniating the arbitrator and imputed corruption to him simply that he might obtain a revision of the award, which in the

Hindu system he might have obtained in regular course of appeal without any such imputation. As the practice grew, all respectable persons declined references. Dr. Altekar has suggested another reason for the breakdown of the panchayat system , viz., the unwillingness of the British Indian Courts to enforce a decision of the Panchayats (V. C. W. I. pp. 52, 53). This may also be true, because, though a panchayat decision may be good as an award it cannot be directly executed until and unless it is made a decree of Court by a separate proceeding.

29. The Sabha—The Principal Tribunal.

Besides the King (when he happened to attend) the Sabha, in the days of the later Dharma Sastras, consisted of (*i*) The Pradvivaka, (*ii*) The Sabhyas, (*iii*) The Sabhasads, (*iv*) The Ganaka, (*v*) The Lekhaka, and (*vi*) The Purusha. The last three had only administrative duties which may be briefly referred to. It was the duty of the Ganaka to count money or make calculations in respect of sums involved in the claims before the Court. The Lekhaka had to reduce to writing the allegations of the parties and the statements of the witnesses. The Purusha (also called Sadhyapala) carried out the orders of the Sabha for summoning parties, witnesses and even members of the Sabha ; he also took charge of such of the parties as could not find sureties for their appearance. The Purusha was to be from the Sudra caste (according to an express text of Vyasa). The other two had to be proficient in their respective duties, but their caste was not indicated except by

implication, as according to a text of Vyasa, the Ganaka was required to be also conversant with the Vedas (*Adhyayana Sampanna*). This implies that he must be one of the twice born. There was not even this provision in respect of Lekhaka ; but the Smritichandrika says that by associating (Sahacharyat) him with the Ganaka, the Sutrakara must have intended that even the Lekhaka must be a Dwija. The distinction might not have had much significance at a time when the knowledge of writing was not widespread. But it may be noted for what it is worth, that no caste qualification had been insisted on in the earlier books in respect of these two officials.

A provision in the direction of progressiveness is found in Katyayana (the latest of the important Smritis) to the effect that the King may associate some merchants (Vanik) with the Sabha. The language used is 'merchants of good birth and character, old and well-to-do'. No caste is indicated here but presumably they were expected to be Vysyas or Sudras. The text however goes on to describe their function as 'hearers' (*Srotharah*) ; the Smriti itself explains the purpose of their addition to be 'to give satisfaction to the people' (Rashtra ranjanartham). They were evidently not expected to take part in the decision.

The term *Sabhasad* occurs in some Vedic passages and in many of the Dharma Sastras. The combined effect of various texts is to show that the members of the Sabha fell into two categories, some of them having a more definite role than the rest (Camb. Ind. His. I, 133). It must be remembered that the Sabha as a judicial body could not

be wholly divorced from the Sabha or Parishad as a body of learned men. A sutra of Gautama says 'There are in the world two who were dedicated to the maintenance of morals, the King and the learned Brahmin.'

द्वौलोके धृतव्रतौ राजा बहुश्रुतश्चब्राह्मणः ।

As the administration of justice was part of the attempt to uphold the 'moral order' and as it had to be done in accordance with the Vedas, Upa-Vedas, Dharma Sastras, etc. (Gautama xi, 19) Brahmins had to be associated with the task. The early Dharma Sastras do not however fix any number or allot any particular role to them. Manu and Yagnavalkya begin the description of administration of justice by the King with the words 'along with Brahmins.' By Ch. II, verse 2, Yagnavalkya directs 'Men well-versed in the Vedas conversant with Dharma, and truth-speaking shall be made Sabhasadah by the King.'

श्रुताध्ययन संपन्ना धर्मज्ञास्सत्यवादिनः ।
राज्ञासभासदः कार्याः— ॥

As a matter of grammatical construction, the Mitakshara rightly maintains that this is not a mere repetition of the reference to Brahmins in the preceding verse. It infers the meaning of this verse to be that at least three (because of the use of the plural) learned Brahmins have to be *specifically* associated with the judicial function proceeding at any particular time. The Subhodini makes this clearer still by saying '*Sabhasadah* different from the Brahmins previously referred to have to be constituted.'

पूर्वोक्तेभ्यः ब्राह्मणेभ्यः पृथक् सभासदः कर्तव्याः ।

Not only do we find the word 'Sabhasadah' in this verse; the expression 'Rajna Karyah' is significant. The Mitakshara interprets this to mean that 'the King has to make it worth their while to participate not only by showing honour to them, but also by compensating them pecuniarily'

सभायां यथा सीदन्ति तथा दानमानसत्कारैः राज्ञाकर्तव्याः ।

The word *Dana* seems to preclude the idea of a salary or a permanent appointment. Commenting on a corresponding passage in Narada, the Smriti-chandrika also says: 'They should be so fixed up, by pecuniary compensation, honour, etc., that they will not leave their place in the Sabha.'

सभायांस्थितिं यथा नत्यजन्ति तथा अर्थदान मानप्रभृत्यु पायेन नियुंजीत ।

This way of describing the position makes their *Ad Hoc* character clearer. But even so, the introduction of an element of 'specific association' of a certain number of learned men with the judicial function and of the practice of compensating them pecuniarily is an important step towards officialising a section of the Sabha—at least for the nonce. It differentiated the selected members from the general body of Brahmins present there. It may be interesting in this connection to refer to a statement of Dr. Altekar, based on the practice in the Maharashtra during Pratapasimha's time, that a portion of the five per cent. and ten per cent. paid by the successful and unsuccessful claimants respectively, used to be retained by the state to meet the expenses of the administration and the balance used to be distributed amongst those who acted as Panchayatdars. (V. C. W. I. 48).

The differentiation between the two groups of the members of the Sabha is emphasised in a passage of Vyasa which speaks of them as the *Niyukta* and the *Aniyukta*. In the Mrichchakatika (Ninth Act) Charudatta when he appears before the Court salutes the Adhikrita and the Niyuktas. Katyayana also clearly recognises a differentiation, though he changes the terminology—according to him, the select are the Sabhyas. That the *Niyojana* (selection) was a deliberate process is shown by a passage in Narada which refers to the Niyuktas as 'well tested' (Suparikshita). One commentator interprets this to mean 'found capable of resisting temptation.' This reminds one of Kautilya's test for the appointment of persons as Dharmasthas.

30. The Caste of Judicial Functionaries.

A verse of Katyayana (58) describes the Brahmin as *Maulaih* which Mr. Kane translates 'Hereditary,' apparently on the authority of the Subodhini which paraphrases *Maulaih* as *Pitru Pitamahagataih*. As the reference is to the Brahmins *present* in the Sabha and not to the holders of any office, the word 'hereditary' can reasonably refer only to their learning, thus implying that they must be from a family of learned men. Both by the use of the word Brahmin and by the specific enumeration of their qualifications, it is clearly indicated that the select as well as the general body of the members of the Sabha must be Brahmins. The same qualification is insisted on in many of the Dharma Sastras in respect of the Pradvivaka or the presiding Judge. Manu goes the length of

saying that 'a person who is no better than a Brahmin in name or a fallen Brahmin may be the judicial adviser to the King but not a Sudra under any circumstances.'

जाति मात्रेा पजीवीवा कामं स्याद् ब्राह्मणब्रुवः ।
धर्मप्रवक्तान्नृपतेः नतु शूद्रः कथं च न ॥

Vyasa repeats this statement in terms which will exclude even Kshatriyas and Vysyas, but such exclusion is not supported by some of the other Dharma Sastras. Brihaspati and Katyayana expressly include Kshatriyas and Vysyas among those fit to be appointed when a qualified Brahmin is not available. Commenting on the passage of Vyasa, the Vyavaharaprakasa says that the prohibition against the appointment of Sudras must only be taken to rest on *Adrishtartha* (some nonmanifest ground or ground of revelation) and that it will not be proper to seek to justify it on grounds of Yukti (reason). Manu's preference in favour of one who is a Brahmin *at least in name* must be understood to be in the nature of Arthavada (exaggeration) with a view to insist on the exclusion of a Sudra. We cannot ignore the fact that the unlearned Brahmin or even one who is not leading the kind of life prescribed for a Brahmin has been condemned in very strong language from the earliest times. Vasishta says 'Brahmins who neither study nor teach the Vedas nor keep sacred fires become equal to Sudras * * * The King shall punish that village where Brahmins unobservant of their sacred duty and ignorant of the Vedas subsist by begging * * * Many thousands of Brahmins cannot form a legal

Assembly for declaring the sacred law if they have not fulfilled their sacred duty, are unacquainted with the Vedas, and subsist only by the name of their caste' (S.B.E. XIV, pp. 16 and 17). Manu himself has declared that Brahmins following certain prohibited occupations (including trade and money-lending) should be treated as Sudras, when they come forward as witnesses. (Mc. VIII, 102).

The insistence on the caste of the Pradvivaka and of the members of the Sabha has often been strongly criticised. The criticism will lose its force if what I have already stated as to the original place of the Sudra in the community is remembered. As the source of Dharma was ultimately to be sought in the Vedas, it was only natural that its ascertainment and exposition were regarded as a special function of the class whose duty it was to study and expound the Vedas. The Brahmin was only the expounder of the law and the adviser to the King; the decision or sentence was that of the King (see Prof. Rangaswami Iyengar's *Ancient Indian Polity*, p. 107). The limitation of the right to hold office, particularly judicial office, to certain sections of the community was quite a familiar feature of ancient and mediaeval society.

Speaking of early Celtic society, Sir Henry Maine says that it consisted of three orders, the Equites, the Druids and the Plebians and that the Druids were the supreme Judges in all public and private disputes (E. H. pp. 27 and 31). It was one of the characteristic features of Graeco-Roman Civilisation, that every State divided the human race into two species, the Privileged Citizen and

the non-Privileged alien. (Str. Dav. II, 170). In Greece, only Citizens could act as Judges while the larger part of the population consisted of slaves. In Rome, many offices (including the Magistracy) were originally confined to the ranks of the Patricians. When the Plebians achieved an amelioration of their position, the ancient aristocracy was replaced by a new one in which though every citizen had equal rights before the law, a few families (Patricians and Plebians) furnished all the Magistrates and retained power through the Senate. (Jol. p. 73) The Equites became a separate order when Gracchus transferred to them from the Senators the duty of sitting as jurymen in the courts, especially in trials for extortion. (*Ibid.* p. 78). Even after the Jury system had been adopted for criminal trials, the Jurors were always men of substance, the lowest class ever admitted being just below the Equites. (*Ibid.*, p. 316) The social structure of the late Roman Empire was characterised by a 'rigid class system in which each class had definite duties to perform for the benefit of the state. The Senatorial nobility was intimately connected with the higher posts in the imperial administration. The second order of nobility, namely the Equites did not long survive. The third class, the Curiales, was still in theory a privileged class for purposes of the criminal law, but it was losing its strength and position. The remainder of the population took no part in the government' (*Ibid.*, 446; *see also* Str. Dav. II p. 205). The right to serve as a Judex was also reserved to a limited body, namely, Senators or Equites (Str. Dav. Ch. XVII). Under the Muslim

regime, infidels cannot hold office. Even in England, disabilities of various kinds in the matter of holding office were recognised till recent times.

Mr. Jayaswal asserts that prior to the Manusmriti, there was no support for the claim that the Judge should be a Brahmin (M & Y p. 91) If he means that in the Vedic period, the Gramani who had something to do with the administration of justice in the villages was not a Brahmin, it was of course so. But during the Sutra period, the only community whose association with the King in the administration of justice is provided for is the Brahmin community (except in respect of disputes involving the special practices of certain sections of the people). Gautama expressly says this. Apastamba does not specifically refer to caste in II, *ii*, 29. 5 (S. B. E. Vol. II, 170). But he speaks of 'men of learning' (which presumably means Vedic learning) and the passage may be contrasted with II. x. 26. 4 (*Ibid.*, p. 163) where speaking of the measures for the general protection of subjects, he specifically says that 'men of the first three castes' may be appointed 'over villages and towns for the protection of the people'. Mr. Jayaswal says that during the Maurya days, the Judges were appointed on their merits and not by caste. Kautilya nowhere mentions a caste qualification for appointment to Judicial office. The opening Sutras of Book III do not indicate what distinction the author had in mind between Dharmasthas and Amatyas who together constituted a Court. The qualifications of Dharmasthas are nowhere prescribed. Chapters VIII and IX of Book I, give directions as to the choice and the

qualifications of Amatyas and ch. X provides that Amatyas who have stood the test of temptation (through spies, even under the guise of Dharma) must be appointed to Dhamastiya and Kantaka-sodhana offices. The Sukraniti which is much later in date expressly permits people of all castes to be associated in the administration of justice provided they are otherwise qualified ; it prefers their being of the same caste as the ruler.

31. The Pradvivaka or Presiding Judge.

The texts furnish interesting etymological suggestions as to the significance of the term Pradvivaka. Suffice it here to say that the term connotes a person who examines and crossexamines, investigates the whole matter and pronounces a decision. As shown by the commentary on the Gautama Sutras, the term Pradvivaka apparently began with an etymological significance (*Yaugika*) referring to one who put questions and cleared up matters ; later, it became an official designation (*Roodi*) signifying the presiding Judge. Commenting on Manu viii. 79, Medhatithi says that the term has by his time ceased to bear its etymological significance (*Yaugika*) and become a word with a fixed connotation (*Roodi*). It is possible that the term Pradvivaka was suggested by the Vedic term 'Prasnavivaka' which a commentator explains as 'He who explains the questions put'

कृतान् प्रश्नान् योविविनक्ति ब्रूते ।

Another commentator interprets it as 'He who explains questions put by another and explains

also the answer given.' (or one who answers another's question after careful consideration).

परकीयप्रश्नं सम्यग्विविच्योत्तरस्यवक्ता ।

See Dh. K. I, p. 11.

At one time, his position seems to have been that of a subordinate, *i.e.*, when he sat in the Sabha along with the King; but later, when he presided over the Sabha (though under Royal authority), his function was not merely advisory; the responsibility for the decision was his, though he could not pass a sentence of fine or of corporal punishment (but only Vagdanda and Dhigdanda). In the words of Apararka 'If the King himself attends the hearing, the Pradvivaka is a counsellor: at other times, he is the Hearer (Judge).'

राजाचे व्यवहारान् पश्यति प्राड्विवाकः अनुमन्ता अन्यदातु व्यवहारद्रष्टा ।

A remark of Prof. Jolly (Hindu Law and Custom, p. 297) implies that under the Hindu system, Court-fees were appropriated by the King's Judge. I shall deal with the question of court-fees later; but I may say here that I have not been able to find any text in support of this statement of Dr. Jolly. Referring to Yag. II, 18, he adds 'the wagers in law suits were a source of income for them (Judges)'. This verse of Yagnavalkya must be understood in the light of the following observation of Vinogradoff: 'When the parties agreed to appear before a court, a common step in Greek Roman and Tutonic Law was to provide for the amount of possible compensation and loss in the forthcoming struggle. Besides making good one's

claim, the conquering party meant to get compensation for the risk and danger of the enterprise and for their efforts in carrying it out. The losing party had to incur a penalty for mischievous and useless resistance to the better right. Both parties usually made an agreement on entering on the trial to make a deposit to the court in order that the losing side should incur a fine at the end of the litigation.' (Vin. Hist. Jur. p. 350). In connection with the *Legis Actio Sacramenti* of the Roman law, there have been differences among legal historians (including Maine) as to the significance and purpose of the deposit. In the process known as *Condictio*, the sum staked went to the successful litigant and not to the state. The *Sapana Vivada* (wager-suit) referred to by Yagnavalkya is dealt with in greater detail in Narada (I. 4 and 5). Proceedings are of two kinds, he says: *Sottara*, i.e., attended by a wager and *Anuttara*, i.e., not attended by a wager. The former is one in which the parties (or either of them) promise in writing to pay a certain sum (or different sums) over and above the amount in dispute. The defeated party has in such a case to pay not merely the amount decreed against him but also (i) a fine and (ii) the amount staked by him. It is explained by the commentator that the stake is a sign of confidence on the part of the wagerer in his own case. Some commentators on Narada's verse would make the wager payable to the successful party while others make it payable to the King. But none suggests that it would go to the Judge. All the commentators on Yagnavalkya's verse make the wager amount payable to the King. The

Commentary of Apararka makes it clear that the amount was not intended to be taken by the Judge. Referring to the word *dapayet* (shall cause to be paid) in the verse, Apararka says : 'The Pradvivaka shall cause the wager amount to be paid to the King and the proved amount to be paid to the creditor—decree-holder. Where there is no Pradvivaka (*i.e.*, where the King himself attends) the King shall himself receive the money.'

पणं राज्ञे साधितं च धनं धनिने प्राड्विवाकः दापयेत् । प्राड्विवाकाभावे राजा स्वयमेव गृह्णीयात् ।

On a proper reading of the passage, the contradistinction here is not between the *appropriation* of the amount by the Pradvivaka and its *appropriation* by the King but between the necessity for and the absence of the necessity for a 'direction to pay the King,' because when the King himself presides over the court (as indicated by the word *Swayameva*), he can directly receive the wager amount and no direction to pay the King will be necessary. The annotation became necessary because in the latter case, the causal form (*shall cause to be paid*) will not be appropriate grammatically. This interpretation is confirmed by the Balambhatti.

32. The Sabhyas.

The responsibility of the members of the *Sabha* shows a progressive differentiation and development. In Manu, there is a general declamation of a *Sabha* where a failure of justice takes place. Then follows a sentence 'One should not enter a sabha or (if one goes in) one must pronounce

right, if one does not express one's view or expresses a wrong view, such person becomes a sinner.'

सभा वा न प्रवेष्टव्या वक्तव्यं वा समञ्जसम् ।
अब्रुवन् विब्रुवन्वापि नरो भवति किल्बिषी ॥

Manu has not definitely drawn a distinction between the Niyukta and the Aniyukta members of the Sabha. But the commentators interpreting the above verse in the light of the later distinction between the two sets of members state that this sloka must be understood to relate to the Aniyukta. Commenting upon Yagnavalkya II. 1, corresponding to Manu VIII. 1, the Mitakshara points out that the use of the instrumental case in the expressions 'along with the learned' (Vidvadbhissaha) and 'along with the Brahmins' (Brahmanaissaha) indicates according to a well known rule of grammar (*Saha Yukte Apradhane*) that the learned men of the Sabha are of only secondary importance. In support of this inference, Vignaneswara further relies on a text of Manu which throws on the ruler the sin arising from an improper conviction or acquittal. Medhatithi however reads more into the above quoted verse of Manu. He interprets it as possibly comprehending the Niyuktas also. Another verse of Manu says that out of the sin of improper judgment, a fourth shall fall on those in the Sabha and a fourth on the King. This language will visit the sin on *all* the people in the Sabha and one of the commentators (Govindaraja) expressly says so and would include even spectators.

सर्वान् सभास्थितान् प्रेक्षमाणान् ।

Medhatithi says that this statement is in the nature of Arthavada and not meant to be taken literally. But the Vyavaharodyota would use this very verse to indicate a distinction between Brahmins who are there merely as spectators and brahmins who are *Sabhasads* in the technical sense, and would limit the sinfulness to the Sabhyas as distinguished from the general body of Brahmins present.

अनेनैव सभ्यानां प्रत्यवायं वदता सभोपविष्टानां ब्राह्मणानां सभासदां च भेद उक्तः । सभ्यानामेव प्रत्यवायः न तु ब्राह्मणानाम् ।

Commenting on Yag. II, 2, the Mitakshara makes a pointed distinction between the responsibility of the Niyuktas and that of the Aniyuktas. It says, 'in the case of Niyuktas, they have not only to pronounce the correct decision, they must also try to prevent the King from acting contrary to it—otherwise they will incur a sin. * * * In the case of the Aniyuktas however their making a wrong pronouncement or not making a pronouncement at all will make them sinners, but not their omission to prevent the King from doing wrong.'

नियुक्तानां यथावस्थितकथनेपि यदि राजा अन्यथा करोति तदासौ निवारणीयः अन्यथा दोषः । अनियुक्तानां तु अन्यथाभिधाने अनभिधाने वा दोषः नतु राज्ञः अनिवारणे ॥

In support of this differentiation, Vignaneswara relies on two verses of Katyayana (74 and 75), which say :—The Sabhasads shall not leave alone a King who begins to act unjustly . . . . Those who follow the King who proceeds in an

unjust manner also become participators therein; therefore the King should be awakened by them (to the right course).

अधर्मतः प्रवृत्तं तु नोपेक्षेरन् सभासदः । and अन्यायेनापि तं यान्तं येनुयान्ति सभासदः । तेपि तद्भागिनस्तस्माद्बोधनीयस्स तैर्नृपः ॥

(*See also* Dandaviveka, p. 19 and Varadaraja's Vyavaharanirnaya, Prof. Rangaswami Iyengar's Edition, pp. 18-20).

The point is further elaborated by the Subodhini when commenting on Yag. II, 4. The verse provides temporal punishment also for the Sabhyas, if by reason of partiality, covetousness or fear (as distinguished from ignorance or mistake) they give a wrong decision. Katyayana says that even error is punishable, if it is due to want of sufficient care. The author of the Subodhini takes it that this punishment must be meted out both to the Niyuktas and to the Aniyuktas. As a matter of textual interpretation however, he thinks that *Sabhyas* in Yagnavalkya's text (II, 4) means only Niyuktas. In the case of Aniyuktas, he suggests that the punishment should be lighter than in the case of Niyuktas. His reasoning is noteworthy. The Aniyuktas, he says, are only guilty of transgressing the Sastras (a duty imposed on them by the Sastras) when they give a wrong decision. But the Niyuktas (if they do so) are guilty not only of transgression of the Sastras but also of violating the direction issued to them by the King by the very act of making them Niyuktas. (*see also* The Dandaviveka, pp. 105 and 337, where corrupt Sabhyas are spoken of as *Prakasa Taskaras*, *i.e.*, open thieves, as distinguished

from the ordinary thief who only steals on the sly.) A passage of Narada says that none should make any pronouncement in a law suit except he be a Niyukta.

(नानियुक्तेन वक्तव्यं व्यवहारे कथंचन)

To reconcile this passage with other texts, the Smritichandrika and the Vyavaharaprakasa say that this must refer to mere 'casual visitors'. Stressing the difference between the responsibility of the Sabhyas and the responsibility of the Judge or the King, Visvarupa says, the King or his representative should suffer twice the punishment of all the Sabhyas because the ultimate decision is that of the King or his representative. The Sabhyas are sometimes spoken of as Jurors or Assessors. These words must be understood without importing the implications which they carry in modern Anglo-Indian practice. The Hindu Judicial system does not appear to have drawn a distinction between the decision of questions of fact and a decision on questions of law, so far as the judicial powers of the Sabhyas go. They have a measure of responsibility for the decision as a whole but not the ultimate responsibility. That the decision was regarded as that of the Sabha and not of the King or the Judge as an individual is indicated by the language of Katyayana (221) which says: 'After success had been declared by the Sabhyas' (जये अवधृते सभ्यैः) and of Narada II, 43, which contrasts 'a person declared defeated by the Sabhyas' (सभ्यैरेव जितः) with a person who is to be subsequently dealt with by the King (पश्चाद्राज्ञा शास्यः)

83. Comparison with some Tribunals of Europe.

A comparison or contrast of the Hindu system with the Jury system of England during certain stages in its development may be instructive. In the earliest stage, the general body of suitors were themselves the Judges in the Hundred and the County Courts. The Sheriff was simply the President of the Courts. Hence, it was the County or the Hundred and not the Sheriff or Reeve that was amerced by Royal Judges for false judgment. (H. E. L., I, pp. 10-12). At a later stage, when a case was heard by Judge and Jury, a complaint against the judgment was an accusation against the Judge and the complaint against the verdict of a Jury was an accusation of Perjury, because at that stage the jurors differed but little from witnesses. The Judge or Jury were liable to be punished if the complaint succeeded. (*Ibid.*, pp. 213-217 and 336). The modern witness and the modern law of evidence began to appear in England only in the course of the sixteenth century when the Jury were losing their character of witnesses. (*Ibid.*, p. 304) Even in seventeenth century England, Jurymen could decide on their own knowledge (*Ibid.*, p. 333).

The powers of the Curia Regis in England and later of the King's Court were not derived from the Witanagemot but by delegation from the King whose powers became practically absolute under the Norman and Angevin regimes. In the Hindu system, the Sabha perhaps had a double parentage: The status of the Aniyukta Sabhyas must apparently be traced to the Sabha of the ancient period; but that of the Niyuktas was in

some measure referable to Royal authority. That of the Pradvivaka (at any rate in the later stage) must be taken to have been derived from the King. When, as in England, the King ceased to take personal part in the administration of justice except as a kind of ultimate appellate authority, the sabha situate in the capital (and probably similar sabhas in the headquarters of the provincial Governors or Chiefs) became the High Court of Justice. It was an official or at least quasi-official and professional institution and its successful working for some centuries before the date of the Smritis of Narada and Brihaspati probably accounts for the remarkable development in the law of procedure which one notices when comparing Manu or Yagnavalkya with Narada, Brihaspati and Katyayana. Something like this happened even in England; but in India, the Royal or Superior Court did not (as it did in England) draw to itself the work of the popular or local Courts.

The early Roman system and the Formulary system knew of a division of functions between Prætor and the Judex, but the division was not on the same lines as in India. Under the Formulary system, the statement of the case was settled between the parties under the supervision of the Prætor, so as to define as exactly as possible the issue (intentio) which the Judex was to try. The Judex was not quite an official. He had only to give a finding on the point referred to him. The legal consequence of the finding was stated in the Prætor's reference itself. The Judex represented what may be called the 'lay element' and was

often agreed on by the parties. But the Judex was not necessarily limited to questions of fact (Str. Dav. I, pp. 73-76). Though the responsibility for the decision was that of the Judex, he was entitled to ask for the advice and assistance of Assessors. (*Ibid.*, p. 205). Sometimes, reference was made not to a single Judex but to a body. A Jury system came into vogue first in certain Civil trials and later in Criminal trials also. In Cicero's time, Criminal charges were tried by Courts consisting of a Bench of Jurymen presided over by a Magistrate. (*Ibid.*, II, p. 1).

In Athens, the Areopagus was the older Court of the days of aristocracy. With the advent of democracy, the Heliastic Court represented the "people" sitting in a judicial capacity. Democracy was held to involve the obligation as well as the right of every citizen to take part in judicial administration as well as in legislation. It was also believed that a large body of ordinary citizens chosen by lot would be more fearless and independent than a small panel of elected Judges. The Heliasts were both Judge and Jury. Originally they seem to have acted only as a Court of appeal; but they soon became the supreme Court for the trial of all public cases except homicide. All preliminaries for the trial were prepared by the Archons. In private cases, the dispute was submitted to a Magistrate where the sum involved was small and to certain arbitrators where the amount in dispute exceeded 10 drachmae. The decision of the arbitrators was enforced by the Magistrates and an appeal lay to the Court of Heliasts. Homicide, being regarded as an offence

against the Gods, continued to be tried by the Areopagus. The number constituting the Heliastic Court varied according to the nature and importance of the case. The minimum was 201. In very important cases, it used to be even 1001. No reasons were given or had to be given by the Court for its judgment. Every case had to be finished within the day on which it was begun, a precaution intended to safeguard against the Judges being influenced, intimidated or corrupted. The decision of the Judges was given by a kind of secret voting and without consultation with each other. There was no appeal from the Heliasts but a successful prosecution of the witnesses for giving false evidence would avoid the judgment. (*see The Trial of Socrates*, by Coleman Phillipson, Ch. XI, and XII ; *see also* Vino, Col. P., Vol. II—Article on Greek Law).

34. The Aims of Judicial Administration.

Two views have been taken in different ages and by different systems of law as to the function of a Judge. According to one, he is to use all appropriate methods for the discovery of the truth ; according to the other, he merely stands as an umpire between the parties to see that the rules of the game are observed. Mediaeval English procedure strongly inclined to the second view. (P. & M., II, 670). Vinogradoff makes this general assertion ; 'An ancient trial was not much more than a formulated struggle between the parties in which the Judges had to act more as umpires and Wardens of Order and fair play

than as Investigators of Truth.' (Vin. Hist. Jur., I, p. 348). This theory can have no place in a system like that propounded by the Dharmasastras which regarded the administration of justice not merely as a matter of public order but as a sacred and religious duty. This is made clear by the numerous texts which declare that by reason of the proper administration of justice, the King will not merely obtain the goodwill of his subjects but attain heaven and that by miscarriage of justice, he will not merely lose the goodwill of his subjects but also incur punishment for sin. A like declaration is made in respect of the Pradvivaka and of the members of the Sabha as well. Two verses, one of Manu and the other of Narada, are very significant. The first compares the task of the King or Pradvivaka in arriving at the truth to that of a hunter who tracks his wounded game by the traces of blood. The second compares him to a surgeon who skilfully draws out foreign matter from the body in which it has got imbedded. The Mahabharata compares the task of finding out the truth to that of discovering the feet of a snake and warns the King against being misled by appearances. Stress is constantly laid not merely on the intellectual capacity of the Pradvivaka and of the members of the Sabha, but also on their moral qualifications. The reputation of the Court for impartiality was so jealously guarded that a text of Katyayana declares the Pradvivaka and the Sabhyas punishable for holding private conversations with any of the parties. As already stated, the Hindu system was not prepared to trust the judgment of a single individual however learned and eminent. Gautama

provided that in the event of any difference of opinion among the members of the tribunal, other learned elders should be consulted (Ch. XI, pp. 25, 27). It seems to me (with all respect to Dr. Buhler) that the translation of this passage as given in the Sacred Books of the East (Vol. II, p. 237) does not properly bring out the sense of the Sutra. Dr. Buhler renders it 'if the evidence is conflicting, he shall learn the truth from Brahmins.' Apararka understands *Vipratipattau* in the Sutra to mean "difference of opinion amongst the Judges," (विचारकाणामन्योन्यविप्रतिपत्तौ). This seems the more reasonable interpretation. Dr. Buhler's translation is apparently based on the concluding words of the *Maskari* Bhashya's comment on the passage, but it ignores the opening words.

As early as Apasthamba and Gautama, it was laid down that cases should be decided after examining witnesses; and witnesses who speak falsehood or even decline to speak are condemned to dire penalties not only in their future existence but also at the hands of the King. The Artha-sastra also provides temporal punishment for perjury. (Kautilya, Book III, Ch. II). The exhortation which according to many Smritis the Court is asked to address to the witness, before his examination begins, is a very strong appeal. In this respect, the law in India may be contrasted with the position in some of the ancient systems of the West. In the Roman Law, perjury was a matter left to the vengeance of God and the law never threatened the perjurer with secular penalties. (Str. Dav. I, p. 48). It is the Church that set itself against perjury as a sin. In Mediaeval

England, the temporal law was careless of oaths because 'the weight of the probative procedure of the Courts was being thrown upon the oaths not of the parties nor of witnesses, but of Jurors' (P. & M., II, p. 541). During the twelfth and thirteenth centuries, there was no such thing as 'sworn evidence' placed before the jury. On hearing the pleas of both parties, the Court by its judgment awarded that one of the two litigants must prove his case by his body in battle or by a one-sided ordeal or by an oath with oath-helpers or by the oaths of witnesses. It had no desire to hear and weigh conflicting testimony. It decreed that one of the two parties should hold the proof. The judgment thus came before oath. (*Ibid.*, pp. 598-602). Holdsworth says, 'in the case of perjury the only form of it punishable by the Common Law was the perjury of Jurors. Other forms of perjury were matters for the Ecclesiastical Courts; and the rivalry between the Common Law Courts and the Ecclesiastical Courts made the law of perjury ineffective (H. E. L., III, p. 400).

It remains to be seen whether and how far the Hindu Judicial System made for the realisation of the high ideal that it set before itself. The subject may be considered under the following heads :—

(*a*) The rule or the basis of the decision,
(*b*) Initiation of proceedings,
(*c*) Rules of pleading,
(*d*) Rules relating to Trial,
(*e*) The decision and
(*f*) The principle of finality.

35. The Rule of Decision.

The Gautama Sutra laid down that justice should be administered in accordance with the Vedas, the Dharmasastras, the Angas and the Puranas (besides Desa, Jathi, and Kula Dharmas and the customs of special communities). In cases for which no rules had been specifically given, people must follow what a Parishad (assembly) or at least one Srothriya may approve. It also added 'reasoning' (Tarka) as a means of arriving at the truth. Kautilya, in the concluding portion of Book III, Ch. I of the Arthasastra, has enunciated certain principles in five verses. As these verses correspond in large measure to similar verses in Narada, it will be convenient to consider the two sets of verses together. Before doing so, I may refer to certain provisions in Manu and Yagnavalkya, as they represent an intermediate stage. Manu simply says that the decision should be in conformity with *Dharmam Saswatham* (The Eternal Dharma). Besides referring to the rules of Jathi, Janapada, Sreni, and Kula, Yagnavalkya says that the determination should be 'in accordance with the Dharmasastras,' a statement which (as already stated) the Mitakshara interprets as *wholly* excluding the Arthasastras. Yagnavalkya lays down a further rule

स्मृत्योर्विरोधे न्यायस्तु बलवान् व्यवहारतः ।

which has sometimes been interpreted as recommending the application of Principles of 'Equity' —whatever that may mean. The language does not seem to me to warrant this interpretation.

Conflicts (real or apparent) among vedic injunctions were well-known to the Mimamsa ; and the commentaries on this verse of Yagnavalkya make it clear that by 'Nyaya' it was intended to refer to the well-established rules of the Mimamsa and Nyayasastras dealing with such conflicts, for instance, the Utsarga-Apavada rule—the Samanya Visesha rule, the Savakasa and the Niravakasa rule, the Arthavada rule and the principle of Vikalpa. As early as Gautama, the broad principle of the application of logic (Tarka) in reaching decisions, both on questions of law and on questions of fact has been enunciated. When dealing with questions of fact, *Yukti* is used in the sense of worldly knowledge or experience. (Thus Brihaspati says :

केवलं शास्त्रमाश्रित्य न कर्तव्यो विनिर्णयः। युक्तिहीने विचारे तु धर्महानिः प्रजायते ॥

A matter should not be determined merely on the basis of the Sastras ; if the trial is devoid of yukti, Dharma may be defeated).

The directions in Narada are in the main only an amplification of what is implied in the directions found in Manu and Yagnavalkya. He does not (as already stated) insist on the total exclusion of Arthasastra, but accepts its guidance except where it conflicts with the Dharmasastras. I find it difficult to understand why Dr. Jolly takes the expression 'Arthasastra' in this sloka of Narada to mean 'the dictates of Prudence' (S.B.E., XXXIII, p. 15). Then follows a verse which to some extent corresponds to the provision in Yagnavalkya in respect of conflict of sastraic rules.

Instead of invoking Nyaya, Narada uses the term *Yukti*. (युक्तियुक्तो विधिस्स्मृतः) He also enunciates a general principle व्यवहारो हि बलवान् धर्मस्तेनावहीयते. (Vyavahara is the more potent). Even in respect of this passage, Dr. Jolly's rendering is not quite satisfactory. The passage is obviously of wider scope than a mere provision for 'conflict of sastras.' The difference of opinion among the commentators as to the interpretation of this verse indicates the difference between the orthodox and the liberal points of view. Asahaya, the commentator on Narada, is prepared to treat it as referring to a conflict between Dharmasastra and Lokavyavahara (what obtains in the world) and as giving preference to Lokavyavahara. The Vyavaharamatrika takes the verse to refer to a case of conflict between two sastraic rules and in such cases it is prepared to permit a decision in accordance with Lokavyavahara. The Kalpataru takes the expression *Yuktiyukta* to mean 'consistent with pramana' (Pramana is not restricted to revelation but also includes perception and inference). The Vyavaharachintamani would say that the word Vyavahara in the passage in question means *yukti* and the Vyavaharodyota equates Yukti with Nyaya. The Bhashya on the Naradiyamanusamhita limits the operation of this verse to cases of conflict between sastraic rules and interprets it to mean that that sastraic rule which is more consonant to reason should be followed. I have already referred to the development of the principle recognising custom or usage as valid. It was originally recognised only as a secondary authority and when and in so far as it was not opposed to

Sruti or Smriti. An intermediate stage placed custom on a footing of equality with the rules of the Sastras. Narada (in the above passage) might well have intended to go further and give to custom or usage an overriding authority. This is only a natural and logical development ; and the principle is expressly recognised in the Arthasastra.

Narada has next given two rules which correspond with some variation to two out of the five verses at the end of Book III, Ch. I of Kautilya's Arthasastra. The obscurity of these passages will be noticed if I place them side by side as also Mr. Shama Sastri's translation of the two verses in the Arthasastra and Dr. Jolly's translation of the two verses in Narada.

Arthasastra.	*Narada.*
Sacred law (dharma), evidence (Vyavahara), History (Charitra) and edicts of Kings (Rajasasana) are the four legs of law. Of these four in order, the later is superior to the one previously named.	Virtue, a judicial proceeding documentary evidence and an edict from the King are the four feet of a law suit. Each following one is superior to the one previously named.
Dharma is eternal truth holding its sway over the world ; Vyavahara (evidence) is in witnesses ; Charitra (history) is to be found in the tradition (sangraha) of people and the order	There, virtue is based on truth ; a judicial proceeding (rests) on the statements of the witnesses, documentary evidence (rests) on declarations reduced to writing, an edict (depends)

Arthasastra	*Narada.*
of kings is what is called sasana.	on the pleasure of the king.
धर्मश्च व्यवहारश्च चरित्रं राजशासनम् ।	धर्मश्च व्यवहारश्च चरित्रं राजशासनम् ।
विवादार्थः चतुष्पादः पश्चिमः पूर्वबाधकः ॥	चतुष्पद्व्यवहारोऽयं उत्तरः पूर्वबाधकः ॥
अत्र सत्ये स्थितो धर्मः व्यवहारस्तु साक्षिषु ।	तत्र सत्ये स्थितो धर्मः व्यवहारस्तु साक्षिषु ।
चरित्रं संग्रहे पुंसां राज्ञामाज्ञानुशासनम् ॥	चरित्रं पुस्तकरणे राजाज्ञायां तु शासनम् ॥

The first question is what is the meaning of the words, Dharma, Vyavahara, Charitra and Raja-sasana in the above verses. There is no object in referring in that context to 'Dharma' in the sense of 'Virtue'. Mr. Shama Sastri's interpretation which makes it refer to 'Dharmasastra' may be better, but even so the verses will not give an intelligible meaning. It will be therefore reasonable to understand the word in the sense explained by Brihaspati and Katyayana when they enunciate a similar provision. Mr. Ganapathi Sastriar takes Dharma in the first sloka quoted from the Arthasastra to mean *Artha Yathatmyam* (the true nature of the thing) ; but when he speaks of a later sloka in the same context (beginning with the words

संस्थया धर्मशास्त्रेण)

as an *Apavada* or exception to the first sloka, he would seem to imply that Dharma in the first sloka means Dharmasastra. The word 'Vyavahara,' in view of its amplification by the second verse, can only mean 'the effect of evidence' (Mr. Ganapathi Sastriar interprets it as Sakshivakya Vibhavaniyah) 'Charitra' cannot in the context mean 'History.' Asahaya's commentary no doubt refers to some kinds of documents but it is far from intelligible. I venture to doubt if on the strength of it Dr. Jolly

was justified in rejecting the suggestion (referred to by himself in the footnote on page 7) made by other commentators that Charitra in this verse refers to 'usage.' That interpretation is supported by corresponding provisions in Brihaspati and Katyayana and is confirmed by certain verses in Pitamaha to the same effect.

Katyayana carries the matter one step further as he directs the King to keep an authenticated record of the customs observed in various parts of the country.

> देशस्यानुमतेनैव व्यवस्था या निरूपिता ।
> लिखिता तु सदा धार्या मुद्रिता राजमुद्रया ॥

Mr. Ganapathi Sastriar rightly interprets Charitra as Lokachara. Rajasasana may mean (*i*) a general edict from the King (in the sense of a general declaration) or (*ii*) a special order or authorisation to an individual or (*iii*) a pronouncement which he is authorised in individual cases to make on his own responsibility when all other means of decision fail. The Dharmasastra recognises that within certain limits the King can issue general Edicts. (*Cf.* Yag. II, 186; Kat. 669 and 670). Two verses of Pitamaha quoted in the Smritichandrika authorise a pronouncement by the King on his own responsibility, when there is no material to base a decision on.

> लेख्यं यत्र न विद्येत न भुक्तिर्न च साक्षिणः ।
> न च दिव्यावतारोऽस्ति प्रमाणं तत्र पार्थिवः ॥
> निश्चेतुं येन शक्यास्स्युः वादाः संदिग्धरूपिणः ।
> तेषां नृपः प्रमाणं स्यात् स सर्वस्य प्रभुर्यतः ॥

There are other smriti texts also to the same effect.

The next question is, in what sense are these four described as 'Four feet' (Chatushpad) of a Vyavahara. The statement in Kautilya "Vivadharthah Chathushpadah" is interpreted by Mr. Ganapathi Sastriar. 'The subject-matter of the dispute has four feet or divisions'

विवादविषयोऽर्थः चतुर्भिः पादैर्युक्तः

This is not very informing and makes the sense of the next half of the verse very obscure. The language of Narada (Chatushpad Vyavaharah) makes better sense when it is interpreted "the ways of decision are four, corresponding to Dharma, etc'. A commentator says : 'In this passage the basis on which the decision is given is mentioned when referring to the decision itself'.

यदनुसारेण यो निर्णयः स तच्छब्देन निर्दिश्यते

I must however confess that on any reading, the second half remains obscure *i.e.*, as to what the Badhya Badhaka Bhava signifies or consists in. The idea of relative *superiority* seems to me out of place. The Smritichandrika raises the qeustion why the later-enumerated should prevail over the earlier. It attempts to make out that the verse has reference to certain exceptional cases and so does the Madhaviya. The difficulty lies in so construing this verse of the Arthasastra as not to make it inconsistent with the later verses which lay down the general principle of preference ; namely, when there is disagreement between Usage (Samstha) and the Dharmasastra on the one hand, and Royal order (Sastra is here understood as equivalent to Sasana)

or Evidence (Vyavaharika) on the other, the decision should be in conformity with Dharmasastra.

संस्थया धर्मशास्त्रेण शास्त्रं वा व्यावहारिकम् ।
यस्मिन्नर्थे विरुध्येत धर्मेणार्थं विनिर्णयेत् ॥

Another verse of Kautilya refers to a conflict between Sastra and Dharmanyaya.

शास्त्रं विप्रतिपद्येत धर्मन्यायेन केनचित् । न्यायस्तत्र प्रमाणं स्यात्

Mr. Shama Sastriar translates these two words respectively as 'sacred law' and 'rational law' (King's law) and takes the passage to mean that reason shall be held authoritative. Mr. Ganapathi Sastriar would say 'if Dharmasastra like Manu etc., should conflict with a prevailing practice which is in every way reasonable and righteous such practice must be deemed to be valid'. These obscure passages apparently represent a transition stage when the exact role of the Dharmasastra as against other principles or grounds of adjudication was by no means a matter of general agreement.

Turning next to the corresponding provisions in Brihaspati and Katyayana, I have to state at the outset that as only extracts are available of these two works—and the reconstruction by Professor Rangaswami Iyengar and Mr. Kane has been made out of such extracts—one cannot feel confident that the complete original may not contain more provisions. Brihaspati does not create difficulties by repeating the statement that the later displaces the earlier (पश्चिमः पूर्वबाधकः). His

verse runs धर्मेण व्यवहारेण चरित्रेन नृपाज्ञया । चतुष्प्रकारोऽभिहितः संदिग्धेऽर्थे विनिर्णयः ॥

Decision in respect of matters in issue has been said to be of four kinds—according to Dharma, according to Vyavahara, according to Charitra and according to the King's command. This looks like a conscious attempt to avoid the obscurity involved in the language of the passages in Kautilya and Narada. Brihaspati then proceeds to explain the sense in which he is using the four terms Dharma, Vyavahara, Charitra and Rajasasána :

> सम्यग्विचार्य कार्यं तु युक्त्या संपरिकल्पितम् ।
> परीक्षितं च शपथैः स प्रोक्तो धर्मनिर्णयः ॥
> प्रतिवादी प्रपद्येत स आद्यो धर्मनिर्णयः ।
> दिव्यैर्विशोधितस्सम्यक् द्वितीयः स उदाहृतः ॥
> प्रमाणनिश्चितो यस्तु व्यवहारस्स उच्यते ।
> अनुमानेन निर्णीतं चरित्रं etc.

Dharma stands for Dharmanirnaya which is of two kinds (*a*) Adjudication with reference to probabilities, on the admission of parties or on their oaths, and (*b*) adjudication as a result of an ordeal. Vyavahara means adjudication on the evidence of witnesses and on documents. Charitra means (*a*) adjudication on circumstantial evidence and (*b*) adjudication based on Usage. Rajasasana is an adjudication given by the King without the aid of the aforesaid means or in defiance of the Sastras or of the advice of the Sabhyas (For Dr. Jolly's translation of these and connected verses *see* S.B.E. XXXIII, 285 to 287. The

translation of Dharma as moral law in this context cannot be said to be happy and the translation of some of the other verses is not quite intelligible). Having given his own definition of the four terms, Brihaspati lays down some rules whose general result is that a decision based on evidence is preferable to one based on ordeal, that even the consequence of the result of the evidence (under the ordinary law) must give way to special usages and the King may if he thinks it proper pronounce a decision even in disregard of usage. The conception of Badhya-Badhaka-Bhava is not really one of superiority or inferiority but only the principle that when occasion has arisen for a decision to be given on the later-enumerated of the four bases, a decision on any of the earlier-enumerated bases will not be appropriate.

When it came to Katyayana to deal with these four terms which seem to have acquired some importance by their antiquity and repetition, he made it clear that Dharma-Nirnaya signified disposal of a dispute on the admission of the defendant or opponent who desired to stick to Dharma, Vyavahara was disposal in the regular course, after the parties had joined issue and Charitra was disposal in accordance with the usage of the community whether it be in conformity with the Sastra or opposed to it. Rajasasana was the King's order ; but it was not expected to be opposed to Nyayasastra or to the usage of the community. He repeats the principle about the 'later displacing the earlier ' and adds that where the position is reversed Justice will be destroyed.

(अन्यथा बाधनं यत्र तत्र धर्मो विहन्यते. ।)

I cannot say that these rules or their interpretation by the Commentators are as clear and useful as a modern jurist would like them to be. The following verses from Vyasa seem to me to state the bases of the decision (Nirnaya Sadhana) in the most intelligible form.

प्रमाणैर्हेतुचरितैः शपथेन नृपाज्ञया ।
वादिसंप्रतिपत्या वा निर्णयोऽष्टविधः स्मृतः ॥
लिखितं साक्षिणो भुक्तिः प्रमाणं त्रिविधं स्मृतम् ।
अनुमानं विदुर्हेतुस्तर्कश्चेति मनीषिणः ॥
देशस्थितिः पूर्वकृतां चरित्रं समुदाहृतम् ।
अर्थानुरूपाः शपथाः स्मृतास्सत्यघटादयः ॥
तेषामभावे राजाज्ञां निर्णयं तु विदुर्बुधाः ॥ Dh. K. I, 106.

'Evidence (of three kinds), inference, usage, ordeal, the King's command and the agreement of parties are the eight kinds* or means of decision. Evidence (Pramana) is of three kinds, documents, witnesses and enjoyment ; inference is ratiocination ; usage is the practice of the country or of the people ; ordeals have been variously prescribed such as oath, pot etc. according to circumstances ; in the absence of the above aids, there is the royal order as a way of decision.'

36. Initiation of Proceedings.

The rules relating to initiation of proceedings are calculated to secure redress or punishment in every case of deviation from Dharma but at the same time to avoid vexatious or needless litigation

and unjustifiable harassment. The right to resort to the Court is laid down by Yagnavalkya in very broad terms :—

'If, oppressed by enemies, by acts transgressing the smritis or Achara (a person) makes a representation to the King (or to his officers) it will become the subject-matter of a legal proceeding.'

स्मृत्याचारव्यपेतेन मार्गेणाधर्षितः परैः ।
आवेदयति चेद्राज्ञे व्यवहारपदं हि तत् ॥

Other smritis and commentaries have made interesting attempts to define Vyavahara ; but the above passage of Yagnavalkya is sufficient to show the wide scope of the right to approach the King (or his Court or, as added by the Subodhini, the local or popular Courts like Puga, Sreni, etc.). Narada amplifies the matter by indicating that the claim or complaint can be made either on actual knowledge of a transgression by the opposite party or even on a suspicion of such transgression. Kautilya provides that where the interests affected pertain to God, to Brahmins, to Ascetics, to Women, to Minors, to aged Persons, and to diseased or helpless persons, the Judges shall take cognisance and give redress even though not complained to. (Book III, Ch. 20.). Brihaspati states that in the case of people with immature minds, idiots, mad men, old and sick people, women, etc., the complaint may be conveyed on their behalf by any relative or well-wisher of theirs, whether authorised or not. Both Brihaspati and Katyayana direct that the Court must be very kind and soli-

citous to a distressed person who approaches it for redress; and they condemn in strong words a King or a Judge who pays no heed to a complaint made to him. Before summoning the other party, the Court has to satisfy itself whether the matter appears to be one 'deserving of enquiry' (Karyam Nyayyam Chet). The Smritichandrika illustrates this test thus :—'The opponent need not be summoned if for instance a person complains that in a previous birth he lent some money to the opponent and that he has not repaid it.'

जन्मान्तरे मयास्मै धनं दत्तं तदसौ न प्रयच्छतीतिवद्विचारयोग्यं यदि न स्यात्तदा तत्प्रत्यर्थ्यानयनाय मुद्राप्रदानादिकं न कुर्यात् ।

Narada says : The complainant's story must first be heard, the Court must then see under which of the eighteen titles or the numerous sub-titles of the law the case falls (Narada has already declared that the sub-titles are innumerable and must depend upon circumstances) ; then will come the enquiry and the decision.

The possible misuse of the right of suit or complaint recognised in such broad terms is checked (*i*) by elaborate rules and limitations insisting on early resort to Court or certain other active steps; (*ii*) by discouraging litigation amongst persons standing in particular relationships ; (*iii*) by provisions in the nature of laws against maintenance and champerty and (*iv*) by provisions for imposition of fines and penalties on persons who come forward with unfounded or unprovable case or complaint and either get defeated or withdraw or compound. The first of these topics, namely the law of limi-

tation and the allied rules, is discussed with remarkable subtlety and acumen in the commentaries and Nibandha Granthas. The discussion as to the possibility of an unlawful possession ripening into a lawful title by mere lapse of time will be found to be very interesting. Katyayana who favours it compares it to milk becoming curd by lapse of time (328). The exceptions which he makes to the accrual of title by adverse possession are also noteworthy. (330 to 335). Some of these have been stated by Manu and Kautilya also. As a detailed reference to some aspects of this subject will be found in Mr. Thakur's *Hindu Law of Evidence* published by the Calcutta University, I do not propose to deal with it here.

The provisions relating to the second check *i.e.*, against the maintainability of proceedings as between parent and child, husband and wife, teacher and disciple, master and servant etc., have been sometimes interpreted as resting on the theory that the child, wife or servant, has no independent legal personality or independent proprietary right. Whatever might have been the origin of the rule in primitive times, it must not be forgotten that the Hindu law has from very early times recognised the self-acquisition of the son and the stridhanam of the wife. In the Dharmasastras therefore this restriction on the right of suit or complaint must (as explained by the commentators) be understood not as a *total* deprivation of the right to redress but only as disapproving of and discouraging resort to Court in respect of such disputes. In the words of the Mitakshara,

दृष्टादृष्टयोः श्रेयस्करो न भवति गुर्वादिभिर्व्यवहार इति प्रथमं शिष्यादयो निवारणीयाः राज्ञा सभ्येन....अत्यन्तनिर्बन्धे तु शिष्यादीनामप्युक्तरीत्या प्रवर्तनीयो व्यवहारः ।

'Disciples, etc., should first be dissuaded by the King and by the Sabhyas pointing out that legal proceedings against Guru, etc., were not productive of good either seen (Drishta) or unseen (Adrishta) . . . . if however the situation is compelling (or intolerable), litigation at the instance of disciple etc. will proceed as already stated (just as in any other case).'

The third check is imposed by the rule found both in Narada and in Katyayana, declaring a person punishable for conducting a litigation in which he is not interested, except when he is related as brother, father or son to the person interested, or has been authorised by such person.

यो न भ्राता न च पिता न पुत्रो न नियोगकृत् ।
परार्थवादी दण्ड्यस्स्याद्व्यवहारेषु विब्रुवन् ॥

The following comment thereon of Asahaya is revealing :—

'There are many persons who being possessed of wealth harass others merely under the influence of cupidity, anger or covetousness and they, without any authorisation, concern themselves with disputes between other persons. To hit at such people, this rule has been propounded.'

अनेकपुरुषाः कामक्रोधलोभग्रस्ताः परकीयार्थ एव संबध्यमाना अनियुक्ता अपि धनिकत्वं कृत्वा परान् विद्वेषयन्ति । तन्निवारणार्थं श्लोकः ।

The rule does not exclude the principle of 'Representation' which is recognised except in respect of persons accused of serious crimes. Similarly, in respect of defence, Katyayana says :

अधिकारोभियुक्तस्य नेतरस्यास्त्यसंगतेः "(90)"

"It is the right of the person charged (to give a reply) and not of another person, since the latter is unconnected (with the dispute)."

The Hindu system does not appear to have required any payment in the nature of court-fee *at the time of the institution or initiation* of any proceeding ; the successful creditor paid five per cent. on his claim to the King as Bhriti or Paritoshika. Mr. Jayaswal has stated 'in suits, court-fee was taken both from the plaintiff and from the defendant and security for the same was taken beforehand. The winning party paid at a lower and the losing party at a higher rate' (M. & Y. 288). This statement which is sought to be supported by reference to Manu VIII, 176 and Yagnavalkya II, 42, is apt to mislead. The five per cent. which the winning creditor paid (after obtaining judgment) may perhaps be described as court-fee. But the payment by the losing party (whether plaintiff or defendant) was clearly described to be in the nature of a punitive and not a fiscal provision. Manu VIII, 176 must be understood in the light of the scheme of remedies permitted as between a creditor and a debtor. Under the law as it stood in Manu's time, the creditor was entitled to use force for the realisation of his dues (Manu VIII, 49 & 50). But a debtor so pursued might complain to the Court against the creditor, if the debtor's plea was that

there was no debt due. Verse 176 provides that in such a case, if the debt is ultimately found to be due, the debtor-complainant renders himself liable to a penalty of one-fourth of the amount of the debt. This corresponds to the provision in verse 59 which, dealing with the debtor as a defendant in a creditor's suit, declares that if he fraudulently denies a true debt, the King shall fine him double the amount fraudulently denied. Verse 139 in the same chapter will make the punitive character of these provisions clear. It declares that if a debtor when sued acknowledges the debt, he shall be subjected to a penalty of five per cent. but, if he improperly repudiates the debt, he shall be subjected to a penalty at double that rate. Commenting on this verse, Medhatithi explains the difference in the penalties as due to the fact that in the former case the only fault of the debtor was that he drove the creditor to Court whereas in the latter he had gone further and falsely repudiated the debt. Commenting on Yagn. II, 42, the Mitakshara distinguishes the character of the ten per cent. payable by the debtor from that of the five per cent. payable by the creditor. 'The former is by way of penalty (Dandarupena), the latter is by way of return for services (Bhritirupena) Visvarupa speaks of the five pre cent. as Paritoshika (What is given away in a moment of joy). In the section headed Nirnayadikritya, the Smritichandrika (page 282 of the Mysore Edition) collects and attempts to reconcile all the texts relating to payment of fee or fine to the King by one or the other of the parties to a litigation. Mr. Jayaswal's statement about ' court-fee costs ' in respect of appeals

must also be read with caution. I shall refer to this subject again when dealing with appeals. (For an observation of Dr. Jolly on the subject of court-fee and for remarks thereon, *see* Supra, §. 31).

The law however insisted on honesty and diligence in litigants and enforced this requirement by providing not merely that the losing party should pay a fine to the King (Manu VIII, 59, Yagn. II, 11, Narada II, 43.)--for having put forward a false claim or defence—but also that the disputants should pay a fine if after coming to Court they withdrew or compromised without the permission of the King or except for special reasons. Any improper withdrawal or compromise was (in the words of Katyayana) regarded as 'cheating the King'. The making of a false claim or complaint was declared a sin by Narada and was punishable as such—even to the extent of the punishment prescribed for the offence (falsely charged). Kautilya provided punishment even for a change of front or for pleading inconsistent statements (*See* Book III, Ch. I). Various kinds of default by a plaintiff or a complainant in the regular conduct of the proceedings not only entailed dismissal of the proceeding but also rendered the plaintiff or the complainant liable to punishment (Manu VIII, 53, to 59 ; Kat. 202 and 206).

One other restriction on the initiation of proceedings deserves notice. A passage in Manu declares (and this is repeated in the later Smritis) that the King or his officers shall not foment or on their own initiative start proceedings (M. VIII,

43). The later Smritis and the commentaries make it clear that the object of this rule was to prevent the King or his officers harassing anyone on account of hatred or greed for revenue ; and an exception to the rule is made in respect of certain grave crimes and matters grouped under the heads of Aparadha, Chhala and Prakirnaka. In these excepted cases, action may be taken by the King or his officer on his own knowledge or on the reports received from a spy (Suchaka) or an informer (Stobhaka).

Another provision which looks like a denial of right of suit is really one in the nature of a rule against misjoinder. I refer to it as an instance of the subtlety often found in the commentaries. The verse says that a proceeding against one by many shall not be entertained.

एकस्य बहुभिस्सार्धं....अनादेयो भवेद्वादः (Narada)

Commenting upon this verse, the Mitakshara says ‘ this refers to a case where the claims of the several plaintiffs are different. There are other provisions permitting proceedings by several persons who have the same interest. All that the prohibition means is that several persons with separate interests should not sue one man in the same proceedings’.

37. Rules of Pleading.

The Dharmasastras divide a litigation into four stages :—Pratijna or Bhasha (Plaint), Uttara (Answer), Sadhana or Kriya (Evidence), and Nirnaya (decision). Some enumerate the divisions as Bhasha, Uttara, Kriya, and Pratyakalita.

This division may be compared with the following statement in Salmond's Jurisprudence (650) :—The normal elements of judicial procedure are five :—Summons, Pleading, Proof, Judgment and Execution. With the first and the last of these I shall deal in another connection. *i.e.*, when referring to the coercive power of the court. Beginning from Yagnavalkya, successive writers have gone on elaborating the rules relating to pleadings and the method of trial. A detailed description or examination of these rules, however interesting, will be outside the scope of these lectures. It may be useful to refer to some of them, only to illustrate how they help towards the realisation of the high ideal which Hindu judicial administration set before itself.

'The History of Common Law procedure presents special opportunities for watching the peculiar combination between rules of logic and the requirements of practical life as conceived and formulated by lawyers. * * * The growth of Common Law procedure was chiefly directed towards keeping pleadings within reasonable bounds and conducting them along definite logical avenues. It was important that the parties should not be allowed to beat about the bush and to confuse the jury by irrelevant assertions and arguments. Pleas were classified as traverse, demurrer and confession and avoidance. The issue was allowed to be taken only on one single point although in many cases there may have been several debateable points in the trial'. (Vin. Hist. Jur. pp. 7 to 9). These words of Vinogradoff may well be applied to the history,

aim and characteristics of the ancient Hindu system. Commencing with barely ten verses on the subject in Yagnavalkya, the rules relating to pleading have been elaborated by Narada, Brihaspati and Katyayana till in the last named Smriti we find something like 60 verses on the subject. The Mitakshara supplements Yagnavalkya's texts by numerous quotations from the later Smritis, observing that they are practically implicit in Yagnavalkya's statement. In the Dharmakosa, the texts relating to pleadings and the commentaries thereon cover more than 50 closely printed pages. It is no wonder that (as stated by Colebrooke) Sir William Jones pronounced these rules excellent (Colebrooke's Digest, Preface, p. 10). I shall refer only to a few leading features of the system here.

Emphasising the importance of the plaint, in terms which one may expect from a modern judge, Narada says, 'the plaint has been stated to be the essence of a litigation, if it fails the plaintiff will be defeated'.

सारस्तु व्यवहाराणां प्रतिज्ञा समुदाहृता । तद्धानौ हीयते वादी—

The requisites of a proper plaint are well summarised in the five verses which the Mitakshara quotes from the Smritisangraha. Two of the epithets used, *Samkshipta* (concise) yet *Nikhila* (full) are particularly noticeable. Similarly, the qualities of a written statement are enumerated in a verse quoted from Prajapati. The plaintiff or complainant relates his story which is first written down by the court-clerk on the floor or on a board so as to make it easy for corrections, additions and

improvements thereto being made in accordance with the answers of the plaintiff to questions put to him by the Court. When this writing has taken a definite and final shape, it is recorded. The Surkaniti adds that in that form the plaint should be signed by the plaintiff and sealed by the Court. Amendments to the plaint were permitted only up to the time when the defendant gave his answer. Katyayana would give even further indulgence in the case of omissions due to oversight or fraud (presumably, fraud of the defendant). It may be mentioned that even in England, it was only during the fourteenth or fifteenth century that the practice of oral pleading was superseded by written pleadings ; and there too the rule was that amendments were permissible so long as defendant had not given his answer. (H. E. L. III, pp. 631-635 and 639). When the defendant appeared in answer to a summons or otherwise, the plaintiff was questioned and his statements were recorded in the presence of the defendant ; the latter was allowed to give his answer immediately or after an appropriate adjournment. Two verses of Brihaspati are reminiscent of the early stage when the Court was unable or unwilling to give an *ex parte* decision. He says ' if the defendant does not make an answer, he shall be made to do so by the well known means, Sama (persuasion). Bheda (threatening) Danda (punishment) * * * If even then he does not make his reply (he is treated as) defeated after the lapse of a week's time and punished accordingly.' (*Note.*—On p. 293 of S. B. E. XXXIII, there is an obvious mistranslation in verse (2) when *Dapaniyah* is trans-

lated 'shall be compelled to *pay*.' As the context shows, *Da* is there used not in the sense of giving *money* but in the sense of giving a *reply*. This reading alone will fit in with verse 4 which provides what is to happen if in spite of *Sama*, *Bheda*, etc., a man makes no answer). I may here draw attention to the difference between this verse of Brihaspati and the corresponding verse of Katyayana (194). Brihaspati merely says 'The defeated party deserves to be punished' (जितोसौ दण्डमर्हति), whereas Katyayana's text both according to Mr. Kane and according to the Dharmakosa runs जितोसौ दातुमर्हति 'should give to the plaintiff what he claims'; the corresponding provision in the Arthasastra (Book III, Ch. i) is to the same effect.

Pleas are grouped under four main heads—admission, denial, confession and avoidance and *res judicata*. The rules against misjoinder of claims and of pleas alike are fairly strict, the general principle being that only one claim and only one plea in answer thereto can be investigated at a time. In the words of the Mitakshara

न कश्चिद्वादिप्रतिवादिनोरेकस्मिन् व्यवहारे क्रियाद्वयप्रसंग इति निर्णयः

'The rule is that in one proceeding between parties there can be no trial of two disputes (or disputed matters).

It is however pointed out that in certain instances the additional claim or plea may be recorded and separately considered.

(क्रियाभेदात् क्रमेण व्यवहारं न युगपत्)

To this the Vyavaharamatrika adds a qualification or explanation

यत्र नानाद्रव्याण्येकहेतुसाध्यानि यथा मम सुवर्णरजतधान्यानि अनेन बलाद् गृहीतानीति तत्र युगपदेव निर्णयः कार्यः, एकप्रमाणसाध्यतया एकत्वात् ।

Where several things can be covered by the same evidence, as when a man says that his gold, silver and paddy were forcibly carried away by another, the whole matter may be determined in the same proceeding : where the matter can be proved by the same evidence, the whole claim may be regarded as only one proceeding.

Even in England, it was the rule till 1705 that a defendant can have only one plea in law, the reason suggested being that the ordinary juryman may not be able to deal with a number of exceptions. (H. E. L. III, 631, 632). The principle is discussed at length by the Hindu commentators when dealing with the text of Katyayana (190) which says :

न चैकस्मिन्विवादे तु क्रिया स्याद्वादिनोर्द्वयोः । न चैकत्र क्रियाद्वयम् ॥

Dh. K. I, p. 179, etc.

'In one and the same proceeding, the burden of proof cannot rest upon both the parties (at the same time) nor can both succeed in (simultaneously) establishing what they desire to prove nor can two methods of proof be employed in the same proceeding.'

The written statement or defence must ordinarily be an answer to the plaintiff's claim or complaint and must not, except in certain cases,

put forward a counter-case (Yagn. II, 9 and 10). The law also insisted on the proof being in conformity with the allegations in the pleadings; there is an interesting discussion in the commentaries as to what is to happen if the evidence established something more or something less than was claimed or alleged.

38. Trial.

Speaking of primitive trials, it has been stated by Salmond in broad terms that the whole procedure seemed designed to take away from the tribunal the responsibility of investigating the truth and to cast this burden upon Providence. This was certainly not the case in India under the Dharmasastras. As early as Gautama, the rule was declared that where parties are not agreed the discovery the truth must be made through witnesses.

(विप्रतिपत्तौ। साक्षिनिमित्ता सत्यव्यवस्था)

It was recognised quite early that a proceeding in a Court of law often involved *Suppressio veri* and *Suggestio falsi*. A test of Yagnavalkya declared: (छलं निरस्य भूतेन व्यवहारान्नयेन्नृपः) 'Discarding what is fraudulent, the King should give decision in accordance with the true facts'.

The Sastrakartas seem to have hoped that even after coming to Court, the parties might be prevailed on to admit the truth; the Court was accordingly asked to make such an attempt because (as the Mitakshara says) the decision 'on Evidence' might sometimes go wrong. When no agreement was possible, the trial had to proceed. Manu

says: 'The King presiding over tribunals shall ascertain the truth and determine the correctness of the (allegations regarding the) subject of the suit, the correctness of the testimonies of the witnesses, the description, time and place of the transaction (or incident) giving rise to the case as well as the usages of the country and pronounce a true judgment.' (VIII, 45).

सत्यमर्थं च संपश्येदात्मानमथ साक्षिणः । देशं रूपं च काल च

The purpose of a trial is frequently described as 'desire to ascertain the truth' (तत्वबुभुत्सा). Hindu procedure took every possible precaution, consistently with the conditions or knowledge of the time, to secure the discovery of the truth. I have no desire to minimise its weak points, judged by modern standards. But the extent of its effort to reach the truth deserves notice and appreciation. The importance of pre-appointed evidence was recognised from early times and people were advised to ensure due publicity for their transactions and to secure the presence of reliable witnesses at the time they were entered into. The advisability of embodying transactions in documents was strongly insisted on in the later Smritis and elaborate instructions are contained in them as to how documents should be written, executed, and attested. Some texts even seem to refer to some kind notarial system. The portions dealing with the law of evidence classify documents elaborately, into public and private, ancient and modern, etc., and indicate the relative strength of various kinds of documents and the methods of proving them. Verses 306 and 307 of Katyayana

almost echo the modern rule that documentary evidence cannot be displaced or the terms of a document varied by oral evidence. The provision in Yag. II, 92, about examination and proof of questioned or suspected documents is strikingly modern when read with the commentary thereon (*see also* Kat., 283-289). Narada, 144 and the commentaries thereon furnish an instructive discussion of the concept of *benami*. (Dr. Jolly's translation of this verse in S. B. E. XXXIII, p. 78 does not bring out the sense fully. *Anya Namankam* need not be translated (as he does) as comprehending only documents 'signed by a stranger'. It may equally apply to a document purporting to be in *favour of a stranger*, *i.e.*, a person different from the one really intended to take under it.) The value of possession in accordance with the tenor of a document or of other exercise or assertion of right as per the document is also emphasised. Circumstantial evidence is recognised ; but it is directed to be used with caution, as appearances may be deceptive. Referring to injuries appearing on the body of a complainant, Yagnavalkya warns that they may sometimes be self-inflicted. The Hindu Law excludes hearsay evidence generally : this is taken to be implied by the very word *Sakshi* which means the man who himself saw or heard. One of the exceptions permitted by the Hindu Law deserves notice., *viz.*, a class of witnesses described as *Uttara*. When a pre-appointed witness to a transaction is about to die or is going abroad, he may inform another person of all that he knew about the transaction and authorise him to testify to the same if and when

occasion arose. (*see* Kat. 375 and the footnote thereto; for similar evidence permitted by the Muhammadan law, *see* Baillie's Digest, p. 432).

The rules relating to the production of evidence during the trial and its consideration by the Court will perhaps be relevant here; but as the whole subject of the Hindu Law of Evidence has been dealt with by Mr. Thakur in his very instructive book, I propose to refer only to a few of its features. I may state generally that while the early Dharma-sutras contain a few rules bearing on evidence and its production, the subject goes on developing from stage to stage till we find that Katyayana has nearly 200 verses relating to it (exclusive of the portion relating to ordeals). What amount of attention even details received will be illustrated by a verse of Katyayana (225) which provides that the conventions or the usages of associations, (traders, artisans, etc.) and groups (Brahmins, etc.) must be proved by documents and not by oral evidence or even by ordeal. The reason for the rule is explained by the Vyavaharaprakasa as follows :

पूगादीनां संविदि तु बहुकर्तृकायां लिखितं विना न निर्वाहः सर्वेषां व्यवहर्तृत्वात् नोदासीनसाक्षिसंभवः मानुषसत्त्वे च दिव्यानवकाशः इत्यभिसंध्याभिहितं न दिव्यं न च साक्षिणः ॥

" In the case of a convention of Puga, etc., it can be established only by documentary evidence. As all the people of the Puga are (in effect) parties to a dispute relating to it, there can be no impartial (or unattached) persons to speak as witnesses. And in matters which can be established by ordi-

nary evidence, resort to ordeals is not permissible. Hence the sage said that in such cases 'neither ordeal nor oral evidence (is admissible).'

Another rule of Katyayana (226) states that enjoyment is the best evidence in support of claims to easements, like right of entry through a door, right of way, water course, etc. As an instance of the modernity of conception to which Hindu lawyers can rise, I may draw attention to the fact that Vignaneswara enunciates the principle that a negative cannot be expected to be proved. Commenting on Yag. II, 80, he observes '*Bhava* (existence or fact *i.e.*, a positive) can alone be reasonably asked to be established by evidence because *Abhava* (non-existence or negative) can never be a subject of direct perception by a witness.

(भावस्यैव साध्यत्वं युक्तं अभावस्य स्वरूपेण साक्ष्यादिप्रमेयत्वाभावात्)

Another instance is the recognition of the rule that a witness cannot be compelled to make a statement which may incriminate him. Thus, Jimutavahana says that a witness ought not to be punished for declining to answer when he does so out of an apprehension that by speaking the truth he might get into trouble.

यदि सत्याभिधाने स्वकीयमनर्थप्रवेशमाशंकमानास्तूष्णीमासते तदा न ते दण्डनीयाः

Vyavahara Matrika, Bengal Edition, p. 332).

The endeavour of the Court to get at the truth commenced from the very moment when the parties appeared before it. A verse of Pitamaha

(quoted in Dh. K. I, p. 133) provides that the parties should be made to stand in full view of the Court so that (as the Smritichandrika says) the Judges might not be deprived of the opportunity of noting any signs of unreliability in them.

यत्र स्थिते दुष्टलक्षणप्रच्छादनमशक्यम्

Beginning from Manu, the Smritis give several tests of unreliability noticeable in the physiognomy of persons (*see* for instance Manu VIII, 25, 26, Yag. II, 13 to 15). Vignaneswara and Apararka take care to point out that these suspicious features are only matters to be taken note of and are not to be treated as conclusive.

With the plaint and the answer before it, the Court enters on the stage called *Pratyakalita*. The authorities differ as to the precise significance of this term (*see* Dh. K. I, pp. 18 and 201 and the footnotes to verses 31 and 212 in Mr. Kane's translation of Katyayana). Whatever be the name by which this stage may be called, all the authorities recognise the importance of the stage. As the onus of proof may lie on the plaintiff or on the defendant according to the nature of the case and of the plea, the Judge and Sabha at this stage deliberate on that point and decide who is to adduce the evidence and what the method of proof is to be. Yagnavalkya declares that the complainant should immediately (after the reply) write down the evidence in favour of his petition.

ततोऽर्थी लेखयेत्सद्यः प्रतिज्ञातार्थसाधनम् (Yag. II, 7.)

Arthi in the above passage signifies not necessarily the plaintiff or complainant but the person on

whom the onus lies. A verse cited in the Dharmakosa (I, p. 102) as from Katyayana (but not found in Mr. Kane's edition) is noteworthy as showing the solicitude of the system for the best interests of the litigants. A previous verse prescribed certain hours of the day as the appropriate time for the sitting of the Court. The next verse adds that even this restriction as to time need not be observed if there was any danger of evidence or witnesses being lost.

साक्षिलिंगादिनाशेन साध्यनाशस्य संभवे ।
न कालनियमं पश्येत् व्यवहारस्य दर्शने ॥

An equally noteworthy provision is that made in the Arthasastra (Book IV, Ch. ix) enacting severe penalties for a Judge who threatens, browbeats or unjustly silences one of the parties or abuses or defames them or asks questions which ought not to be asked or makes unnecessary delay and thus tires the parties or helps witnesses by giving them clues.

The method of examining witnesses is stated in verses 339 to 345 of Katyayana (*see also* Manu VIII, 79 and 80). The examination is to be in Court and in the presence of the parties. Medhatithi's commentary on Manu VIII, 60, refers to the possibility of examining witnesses on commission and excludes it; but Katyayana expressly sanctions it. (Verse, 352). According to the Hindu practice, it is the judges who are to put questions to the witnesses. They are directed to watch the behaviour of the witness and decide upon his reliability. (Kat. 385, 386, 393). It is open to the opponent to bring to the notice of the Court circumstances

disqualifying or discrediting a witness, but this must be done when the witness is giving evidence. (Kat. 378, etc.). Vyasa says that the opponent may note his objections on paper and hand it over to the Judge who will elicit the witnesses's answer to the objections. (Dh. K. I, 344). As pointed out by Mr. Kane in the note to Katyayana 381, the weight of authority is against permitting witnesses to be examined to discredit another witness. That the law was anxious to get the best out of the witnesses is shown by the direction in Manu (VIII, 79) that the Pradvivaka should treat them gently and appeasingly (सांत्वयन्). Medhatithi explains that if the witness is harshly treated by the Pradvivaka, he may take fright and lose his balance and thus become unable to remember the whole story.

(पारुष्येण हि प्राड्विवाकाद्बिभ्यतः अप्रकृतिस्थाः न सर्वं स्मरेयुः)

It is not possible to say anything definite as to the existence of a legal profession in Ancient India (*See* a discussion in 19 M.L.J., pp. 153 *et seq.*). Mr. Jayaswal thinks that professional lawyers ought to have existed from the days of Manu or at least from the first century, A.D., (M. & Y., pp. 288-292). I find it difficult to interpret the reference to *Vipra* in Manu VIII, 169, as a reference to a 'Laywer Brahmin.' The commentaries on this verse lend no support to such a reading. The passages in Narada (12·2) and Katyayana (90 to 95) seem rather to refer to Agents than to Advocates or pleaders as we know them, because the persons representing are declared to be 'Parties to the

litigation with the difference however that the success or defeat is that of the party represented.[1]

(अर्थिना संनियुक्तो वा प्रत्यर्थिप्रहितोऽपि वा। यो यस्यार्थे विवदते तयोर्जयपराजयौ ॥)

(*C.F.*, the Cognitores and the Procuratores of the Roman Law ; Buckland, pp. 404). Such a declaration would be uncalled for if the passages were intended to refer to a professional class whose profession itself was to represent others. I may however add that Mr. Kane reads these passages of Katyayana as referring to recognised Agents and Pleaders. (*See* his Introduction to Katyayana, p. xv). The succeeding passages in Katyayana place the *Niyukta* in the same category as Servants, Agents, Disciples and Relatives (of the party). This seems to me to militate against that expression being read as referring to a professional class. The passage in the Sukraniti is perhaps more significant, because it fixes the remuneration payable to the 'representative' and declares him liable to punishment for receiving anything more ; but it is noteworthy that it provides for the appointment of a 'representative' not only on the ground of the party's ignorance of Vyavahara but also on the ground of his being otherwise busy. (Anya Karya Kulena). The Arthasastra makes no reference to a legal profession. Mr. Nilakanta Sastriar in his book on the Cholas (Vol. II, p. 260) states that there appears no trace of the employment of advocates in the days of Chola administration. In the laws of the Ancient Persians (translated by Mr. Bulsara), it is stated that in ancient Babylonia the institution of lawyers did not exist, but that by

the time of the book which Mr. Bulsara was translating, *i.e.*, about the 6th or 7th century, A.D., lawyers were in existence. (*See* pp. 34 and 612). In the Athens of Pericles, there was no Bench of trained Judges or Bar of trained lawyers. A party was not allowed to have his case presented by an Advocate, but there was nothing to prevent his learning by heart and repeating a speech prepared for him by a professional speech-writer (Logographer). The aim of the speech was not so much to inform the Court about the relevant matters, as to excite the emotions of the large audience and make it give its verdict on the impulse of the moment. There were in Athens a large number of Logographers who wrote out speeches for parties and many of them made large incomes, but the profession was regarded with little respect by enlightened Athenians. (See *Trial of Socrates* by Coleman Phillipson). In Rome, there no doubt existed a class of persons (Jurisprudentes) who made law their speciality; but they were not professional lawyers in our sense. They received no remuneration for their services. They were public men who only devoted some of their time to law as part of their public career. Advocacy proper was not the business of the Jurisconsult but of the Orator (Jol. pp. 91 to 94). The notion of law does not include of necessity the existence of a distinct profession of lawyers whether as Judges or as Advocates. 'There cannot well be a science of law without such a profession but justice can be administered according to settled rules by persons taken from the general body of citizens. In England there was no definite legal profession

till more than a century after the Norman Conquest.' (P. & M. Intro. p. xxvii).

To those who have been taught to regard the Roman system as perfect, the following description of a criminal trial under that system must be revealing : 'The Proceedings opened with speeches by Prosecutor and defender and after them followed the examination of witnesses. * * * Side by side with the extreme license of cross-examination, evidence was often admitted without being shifted at all. The defendant could not compel the attendance of witnesses in the way that the Prosecutor can do. * * * The Roman Advocate was not expected to do even lip service to the testimony before the Court and there was nothing in the Roman procedure like a law of evidence in its present sense. The rules of exclusion now observed were not observed * * The Jury listened to whatever the advocate chose to bring before them. His opponent never thinks of objecting, for there is no one to enforce the objection. The Jurymen were excluded from interfering * * When the Jurors have finished hearing the speeches and the evidence, they proceeded to deliver their verdict. Unlike an English Jury, they do not have the assistance of a trained Judge to sum up the evidence for them and direct their attention to the important issues ; nor do they retire to discuss the matter amongst themselves and attempt to arrive at a joint decision. Each one was to give his vote in secret.' (Str. Dav. II, pp. 114 to 128).

It is not clear whether the Hindu practice allowed *both* sides to examine witnesses. The Mitak-

shara, in commenting on Yagnavalkya, II, 80, strongly negatives such a possibility. The theory apparently was that when once the question of onus of proof had been settled by the Judges, the party on whom the burden had been laid had alone to adduce evidence in support of his story. The Court might disbelieve that evidence either on its own view as to its reliability or for reasons pointed out by the opponent. But the opponent had no right to adduce independent evidence in support of his denial of the claim of the party on whom the onus had been thrown. The ambiguous language of Yagnavalkya (II, 80) as also of Manu (VIII, 73) leaves room for this narrow interpretation. But the corresponding provision in Katyayana (408) is too plain to admit of it. It expressly refers to the possibility of one-side adducing evidence superior in quality to that adduced on the other side (*see also* the extracts from Apararka and from the Vyavaharamatrika set out in Dh. K. I, pp. 290 and 291). Another verse of Yagnavalkya (Ch. II, 17) specifically refers to the presence of witnesses on both sides ; but this text and the corresponding verse in Narada have been explained by Vigna-neswara as referring to a special class of cases.

The Arthasastra contains a curious provision as to the course to be adopted by the Judge when witnesses differ. It is not clear whether the difference referred to is one between witnesses on the same side or one between witnesses appearing on opposite sides. In the Chapter relating to Recovery of Debts (Book III, Ch. xi) it is said 'if witnesses differ, judgment may be given in accordance with the statement of a majority of

pure and respectable witnesses or the mean of their statements may be followed or the amount in dispute may be taken by the King. If they attest to a greater amount than what the plaintiff claimed, the excess shall go to the King.' This suggestion has not been put forward in any of the Dharmasastras. The rule laid down by Manu (VIII, 73) is, 'In cases of conflicting testimony, *i.e.*, when witnesses contradict one another, the King shall cause the evidence of the larger number of witnesses to be taken. In case of an equal number of testimonies on each side (or in support of each version), the testimony of witnesses of commendable qualifications will prevail; and in cases where the number of qualified witnesses is equal, the testimonies of excellent Brahmins shall prevail.' Yagnavalkya (II, 78) states the rule practically in the same terms as Manu, omitting the reference to Brahmins. Narada says 'where there is conflicting evidence, the plurality of witnesses decides the matter. If the number of witnesses is equal, the testimony of those must be accepted as correct whose veracity is not open to suspicion. If the number even of such witnesses is equal (the testimony of those must be accepted) who are possessed of a superior memory. Where however an equal number of witnesses possessed of good memory is found on both sides, the evidence of the witnesses is entirely valueless on account of the subtle nature of the law of Evidence' (I, 229, 230; SBE. XXXIII, pp. 95, 96). The commentator suggests that in the leal alternative, the party must either bring forward now witnesses or proceed to ordeal, if he is to escape defeat.

Brihaspati has a provision similar to I, 229 of Narada. The language of Katyayana on this point is not very precise. (*See* verses 359, 400 and 401). He winds up the discussion of the law of evidence with the declaration (in verse 409) that the correct decision is that which is in accord with evidence that is 'faultless according to law.' In verse 315 he has already stated that positive and direct evidence of a witness is more weighty than mere inference, that documentary evidence is of greater value than oral evidence and that unbroken enjoyment for three generations is of greater weight than all other kinds of evidence. The Sukraniti generally advises that the Judge should carefully examine all the evidence and come to a decision. In respect of oral evidence, it gives the warning that a matter cannot always be taken to be proved by the evidence of witnesses, because of the suspicion that the witnesses may be motivated by covetousness, fear or anger

स्नेहलोभभयक्रोधैः कूटसाक्षित्वशङ्कया । केवलैस्साक्षिभिर्नैव कार्यं सिद्ध्यति सर्वदा ॥)

While provision on the lines above stated has been made for cases in which there is conflicting evidence, cases in which no evidence is or can be available give rise to greater difficulty. A modern court may dispose of such cases by holding that the party on whom the onus of proof lies has not discharged that burden. If the ancients resorted to the 'oath' or to the 'Ordeal' in such cases, I do not see how they can be justly accused of "unwillingness to undertake the task of finding out the truth."

Their methods might be right or wrong ; but they were certainly the result of an anxiety to discover the truth. The oath and the ordeal formed part of many ancient systems of judicial administration and were widely prevalent in Europe during the Middle Ages. At one stage, the ordeal was also the 'punishment' ; but at a later stage, the ordeal afforded the 'proof' on which the temporal authority pronounced its judgment or sentence. The practice rested on a belief in the certainty of divine intervention to punish the wicked and to protect the innocent. If to-day civilised nations can pray to God to intervene in their wars, to give victory to the righteous cause, it was a difference only in degree and not in kind if simpler people expected Providence to take note also of the humbler affairs of ordinary men. Even to-day, after a century of Benthamite influence, the nations of the West have not thought fit wholly to discard the Oath in the law of evidence. The rationalist is justified in his criticism that even this amounts to the mixture of religion in law. If the practice is to be justified on pragmatic or psychological grounds, the same argument will be equally available to justify the practice of Oaths (sapatha) and of resort to Ordeals in an age when the possibility of divine intervention was more widely and sincerely believed in. The elaborate ceremonial prescribed in some of the Hindu Law books in connection with the ordeal undoubtedly has relation to the psychological factor. That certain systems like the Roman and the Muslim did not include the practice of Ordeal is not by itself sufficient to condemn the practice. If to-day

we have substituted the procedure based on 'Reason' for the procedure resting on 'Faith,' it is due to a change of beliefs wrought in course of time. More than two thousand years ago, Plato is said to have observed 'when men either do not believe that the Gods exist or believe that the Gods do not interfere in human affairs or believe that the Gods, on receiving petty sacrifices and flatteries will become their accomplice in chicanery and will save them from punishment, the method of divine justice is no longer suitable.' (Plato's Laws, quoted in *Evolution of Law*, Vol. II, p. 636). The writer in 'Evolution of Law' remarks 'even if the element of chance was large in the earlier procedure, the sacrifice of the individual secured the peace of society ; for the belief in the correctness of the divine judgment was so great that even the innocent man believed himself guilty if so found by God. * * * Our modern Criminal Procedure also demands thousands of innocent victims ; so liable to error are our methods of proof and conviction.'

Hindu practice seems to have adopted the ordeal only at an intermediate stage of its legal history. It has been pointed out by Keith (in the Article on 'Ordeals' in Hastings' Encyclopædia of Religion and Ethics) that Ordeal seems to have been little known in the Vedic period or even to the early jurists. Apastamba makes only a passing reference to it. Gautama speaks of *Sapatha* as approved only 'by some' (*Eke*). The Arthasastra makes no reference to it. But the Cambridge History says that during the Mauryan Empire, trials by Wager or Ordeal were also common.

(Vol. I, p. 485). In the Manu Smriti, it makes its definite appearance ; but Manu introduces the subject of *sapatha* as applicable to 'suits without witnesses' (*Asakshikeshu* VIII, 109). The Mitakshara points out that while other kinds of evidence can only prove a 'positive' the Ordeal can establish even a 'negative', *e.g.*, the innocence of a person suspected or accused of a crime (*see* commentary on Yag. II, 96). In a system in which guilt or innocence raised a question not merely of temporal punishment but also of penance, expiation, social communion, etc., a mere verdict of 'not proven' would not have cleared a man's position in the eyes of God or of his fellowmen. The ordeal was expected to establish his innocence beyond doubt. This perhaps accounts for the increasing favour with which the subject of Ordeal has been regarded by some of the Dharmasastra writers, while other authors have tried to restrict the resort to it within very strict limits. Fa Hian and Sung Yan make a passing reference to the practice of ordeals as follows : 'In investigating doubtful cases, they rely on the pure or foul effect of drastic medicines' (Beal's Buddhist Records, Intro. p. xciv). Hioun Thsang makes a more detailed reference to the subject and describes four kinds of ordeals, Water, Fire, Weighing, and Poison (Beal I, 84). Other historical references and statements in some of the Nibandha Granthas seem to suggest a wide use of Ordeals in India during the middle ages. *i.e.*, during the period of political decadence. This is perhaps explicable on the following ground suggested by the writer in the *Evolution of Law* already quoted from ; he

says that secular and rational methods of justice are practicable 'only when education has sufficiently advanced to enable fairly sound results to be obtained with the procedure of Reason. The impartiality of those who find the judgment must be beyond doubt, and conditions of life must be such that it is possible in the main to reach a reasonable establishment of the necessary facts.'

It has been said that some systems which have discarded ordeals have substituted torture in their place; and Kautilya's Arthasastra which does not recognise ordeals has been interpreted by some writers as recommending torture with a view to extort confession. This depends on the meaning of the reference to *Karma* (as distinguished from *Vakya*) in Chap. VIII of Book IV. Mr. Ramachandra Dikshitar has combated the view that 'Karma' in that context can mean torture. (*Hindu Administrative Problems*, p. 237, *et seq.*) It is not easy to believe that Kautilya who in the very next chapter prescribes punishment for an officer who may threaten or brow-beat a party is likely to have authorised torture on mere suspicion. The word *Aptadosha* used by Kautilya in this connection is difficult to interpret as one merely 'suspected of crime.' Mr. Ganapathi Sastriar interprets *Aptadosha* as '*Nischitaparadha*' (one whose guilt has been established) and he interprets *Karma* as *Dandakarma* (punishment). Mr. Monahan understands this passage in the Arthasastra as laying down 'that only those whose guilt has been proved shall be subjected to torture and that, only if they persist in denying their guilt' (L.B. p. 120). Comparing this with the

practice that prevailed in ancient Europe and with the present day methods of the Police in India, he explains it all as 'based on the view that as the best and the most conclusive evidence of guilt, a confession should be obtained where this is possible to clinch and confirm other proof.' (*Ibid.* p. 119). In Chap. VIII of Book IV, Kautilya himself points out the danger of relying on 'Appearances' and insists on the production of conclusive evidence as to guilt. He however contemplates the possibility of the decision of a case being influenced by information gathered through spies. (See the last verse in Book III, Ch. I). The Dharmasastras however nowhere recommend or countenance torture.

Referring to the practice of witnesses being questioned by Judges, Mr. Jayaswal observes: 'Witnesses were cross-examined by Judges. It was indeed so severe as to be a form of torture, even the accused being cross-examined.' (M. & Y., p. 133). To speak of the cross-examination of the accused, severe though it be, as a form of torture is clearly an exaggeration. Beal's *Buddhist Records* (Book II, pp. 83, 84) contains the following report of Hyoun Tsang's impression in the matter: 'In questioning an accused person, if he replies with frankness, the punishment is proportioned accordingly.' This cannot be described as an attempt to extort a confession by promising a lighter sentence. The next preceding sentence in Beal runs, 'in the investigation of criminal cases, there is no use of rod or staff to obtain proofs.' Manu XI, 228 to 231 represent a religio-psychological belief in which confession (as in the Roman

Church) is an important step. Before condemning the Hindu Procedure, it must be remembered that under it the Court had not the benefit of a preliminary investigation by the police, with provisions like those contained in section 27 of the Indian Evidence Act enabling the police to place before the Court the results of their cross-examination of the accused. Though some texts refer to information collected through spies, it is not possible to say how exactly the Dharmasastras contemplated such information being used. Passages like Yag. II, 266 to 269 and Kat. 797 contemplate that in certain circumstances, the onus of exculpating himself may be thrown on the accused. It seems to me too much to conclude from such passages that the Hindu Law adopted what has been called the inquisitorial procedure. The general principle was laid down as early as in Apastamba to the effect that no one should be punished on mere suspicion and that the King should pass sentence only after full investigation by means of witnesses or by Ordeal.

(न च संदेहेदण्डं कुर्यात् । सुविचितं विचित्य दैवप्रश्नेभ्यः राजा दण्डाय प्रतिपद्येत)

I have already referred to the direction in Kautilya insisting on production of conclusive evidence of guilt. (समाप्तकरणम् नियमयेत्)

These rules do not seem to have been discarded by the later Dharmasastras. Yagnavalkya's verses (II, 266, etc.) seem to be analogous to, though somewhat wider than the modern rule which shifts the onus of proof to a person found in possession of property recently stolen. Chapter VI of Book IV

of the Arthasastra, dealing with criminals seized on suspicion or in the course of the commission of a crime, must be understood in the same way. It seems to have been assumed at one time that he who *first* complained of a wrong was entitled to succeed because it was pain that must have driven him to resort to law. Kautilya refutes this assumption and says 'whether a complaint is lodged first or last, it is the evidence of witnesses that must be depended on. In the absence of witnesses, the nature of the hurt and other circumstances connected with the quarrel shall be evidence.' (Book III, Ch. 19).

Another part of the Hindu Law of Evidence which has often been criticised is the existence of rules arbitrarily or artificially fixing the number of witnesses required in certain cases and the weight due to the testimony of various classes of witnesses and excluding several classes of witnesses on the ground of incompetence. A perusal of that part of Best on *Evidence* which treats of these topics will show that such rules have existed all the world over until very recent times; to a large extent they were explained (if not justified) by the social conditions of the day. Medhatithi's commentary on Manu VIII, 62 and 65 (for instance) gives very sound commonsense reasons for preferring certain persons as witnesses to transactions. The Dharmasastras have taken care to qualify many of the arbitrary rules by stating that they should not be taken as absolute and that in special circumstances a smaller number of witnesses than the number prescribed may be recognised as sufficient and even incompetent witnesses may be permitted to depose.

22

The texts clearly differentiate the question of admissibility from that of weight and it was not the rule of the Hindu Law that a party who had placed legal evidence before the Court was necessarily entitled to have his case taken as proved. Katyayana (340) directs that the King (or Judge) and the members of the Sabha should examine the statements made by the witnesses.

(साक्षिभिर्भाषितं वाक्यं सभ्यैस्सह परीक्षयेत्)

He next (409) says that when evidence which is admissible according to law has been placed before the Court, the time comes for the testing of that evidence.

(यदा शुद्धा क्रिया न्यायात्तदा तद्वाक्यशोधनम्)

The reason is given in the next half of that verse in rather enigmatic language 'That only is faultless which follows from faultless testimony'

(शुद्धाद्वाक्याच्च यश्शुद्धः स शुद्धोऽर्थ इति स्थितिः)

The word *Suddha* (faultless) is used in three different senses in verse 409: this is explained by the Subodhini as follows:—The faultlessness referred to in the first part of the verse refers to the absence of legal defect in the witnesses or other kind of evidence offered as proof. The 'Suddha' in the next foot refers to the absence of circumstances creating a contrary belief. In the result (as indicated in the last foot) that subject must be taken to be established in respect of which there is no defect in the evidence and there is nothing to induce a contrary belief.

(यदा शुद्धा क्रिया न्यायादित्यंशेन साक्षिलक्षणक्रियारूप-करणगतदोषाभावः अभिधीयते । शुद्धाद्वाक्याद्यश्शुद्धः इत्यनेन बाधक-प्रत्ययाभावः अभिधीयते । एवं च करणदोषबाधकप्रत्यययोरभावे सति अर्थः अवितथः सत्यः इति तात्पर्यार्थः)

It seems to have been recognised at an early stage in the history of Hindu procedure that a litigation will not be terminated by the death of any of the parties during its pendency. Dealing with the text of Yagnavalkya (II. 29) which declares the position of the heir when the ancestor happens to die pending a suit relating to possession of immovable property, Vignaneswara says 'if the disputant dies before the dispute is determined, the dispute does not come to an end.'

(अनिर्णीतव्यवहारे व्यवहर्तरि प्रेते व्यवहारो न निवर्तते इति स्थितम्)and Apararka interprets the reference in the sloka to the heir carrying on the dispute

(तस्य रिक्थीतमुद्धरेत्)

as follows: 'His heir *i.e.*, person, like son, etc., taking the estate shall complete the litigation'

(तस्य रिक्थी धनग्राहीपुत्रादिः तमभियोगमुद्धरेत् व्यवहारं समापयेदित्यर्थः)

This text of Yagnavalkya and the corresponding passage in Narada also adopt the principle that once a litigation has been started against a person, his legal representative will be in no higher position than the ancestor himself. An example will help to illustrate the principle. If immovable property had been enjoyed by a family for three generations

the enjoyer gets the benefit of certain presumptions in his favour ; but if a litigation is started during the second generation, a legal representative succeeding *pendente lite* to a person of the second generation cannot claim that his possession must be regarded as possession of the third generation and entitled as such to the benefit of the presumption arising from enjoyment for three generations.

39. Decision.

Various modes of disposal of a suit are recognised by the Smritis, the broad distinction underlying them being that in certain cases the re-agitation of the matter (except by some thing in the nature of an appeal) is precluded and that in other cases it is not. Three terms that occur in the books in this connection require to be noticed, *Hinavada*, *Jayapatra* and *Paschatkara*. A Hinavadi is literally a 'losing party'. A person has been declared to become a Hinavadi for several reasons, chief among them being non-appearance, omission to answer, unreasonable delay, self-contradiction, change of case, etc. This is provided for in one form or another from the time of Kautilya ; but the cases are conveniently grouped in Katyayana 195-207 (*see also* Manu VIII. 53-56 ; Yag. II. 16 ; Narada I. 56, etc). By becoming a Hinavadi, a person incurs a liability to fine ; but in many cases he may nevertheless insist on his suit being heard (Kat. 208 and 209). The earlier books are however not clear on the distinction between those instances in which the case can be heard or the matter reagitated and those n which it cannot be. From Narada there begins

a clearer recognition of this distinction (compare Nar. II. 24 with 25, 32 and 33 and the commentaries thereon. *See* the footnote in S.B.E., Vol. 33, pp. 31-32. *See* Dh. K. I, pp. 203-204). The commentators emphasise the distinction between *Vadahani* and *Arthahani* (*see* the comments on a verse of Brihaspati in Dh. K. I. P. 206). This is clear from the observation in the *Parasara Madhaviya* (quoted in Dh. K, I, 207) in connection with Kat. 265, to the following effect, ' the author next proceeds to declare the right of the Hinavadi to assert his claim again after he had been punished '

(हीनवादिनः दण्डेन पुनर्वादाधिकारमाह)

On the same page, referring to an express provision against reagitation of the matter, the Smriti Chandrika limits the prohibition, saying that it applies only to criminal proceedings (मन्यु कृतविवाद.) It is Katyayana who clearly stated the distinction in verses 208 and 209. The commentators make a point of the difference between the language employed in Kat. p. 208 and that employed in 209. The former states हीनस्य गृह्यते वादः which is interpreted as " the contention of the Hina (party in default) is taken up or received," as for example when the absent party appears though it be after the date fixed for the hearing. Verse 209 speaks of *Uddhara* which is interpreted as Punarvyavahara (re-agitation or second suit). A further distinction is drawn between *Hinavakyajita* and *Svavakyahina* (defeated on his own admission or testimony).

The decision of the Court is to be embodied in a *Jayapatra* to be given to the successful party.

It is provided that a plea of *res judicata* should ordinarily be established by the production of the Jayapatra given in the previous litigation, but if for any reason the Jayapatra is not available, the previous judgment may be proved by the evidence of the King, the Judge or the Sabhyas who took part in it. It appears from an observation in the *Vyavahara Nirnaya* (Prof. Rangaswami Aiyangar's edition, p. 53) that no Jayapatra used to be given by inferior courts. Accordingly, if a question subsequently arose as to their decision or as to what happened before them, the matter must be proved by the oral evidence of the members of the former tribunal. Katyayana (amplifying a similar provision in Brihaspati) provides that the judgment which must bear the seal of the king and must be signed by the members of the Court shall contain full particulars of the pleadings, the statements of the witnesses and the decision (259-264). One of these verses (261) seems to contemplate a Jayapatra being given even by inferior tribunals—it mentions *kula* in particular. The commentators point out that details of the pleadings are required to be set out in the judgment because if and when a plea of *res judicata* is raised they will be useful to show the precise nature of the former proceeding. While the earlier authorities have used the term Jayapatra generally, Katyayana draws a distinction between Paschatkara and Jayapatra, limiting the latter to decisions not given on the merits (like some of the Hinavada cases) and applying the word Paschatkara to decisions given after contest (verses 264 and 265).

40. Finality.

In modern law, when a proceeding has terminated adversely to one of the parties, the loser may seek to escape from its effect (1) by re-opening that very proceeding, *e.g.*, by setting aside an *ex parte* decree or by an application for review, (2) by filing a second suit in respect of the same subject-matter, after vacating or in effect ignoring the first adjudication on the ground of fraud, want of jurisdiction, etc. (s. 44 of the Evidence Act) and (3) by proceedings taken before a superior Court. Each of these ways had its counter-part in ancient Hindu procedure and subject to the result of some such proceeding, the principle of finality of a decision once rendered was recognised. In this connection an ambiguity arising out of the two-fold meaning of the word *vyavahara* used in the texts must be noted. In one sense, vyavahara means any 'transaction in law.' In this sense, there are certain passages which provide for what is called *Krita Nivartana* (upsetting of what has been done). For instance, Manu VIII. 163 provides 'an act (*vyavahara*) done by an insane, intoxicated or diseased person or by an infant or old man, etc. can never be valid' and there follow other verses in the same strain (*see also* Yag. II, 31, etc.; Kautilya Bk. III, Ch. I gives a list of invalid transactions). A litigation may also be one of such 'transactions' but the texts above referred to are of a wider scope. Commenting on Yag. II, 32, the Vira Mitrodaya says: 'here the word *vyavahara* is not limited to litigation but includes all transactions such as gift, sale, mortgage, etc.'

(अत्र व्यवहारः न न्यायमात्रं किंतु दानविक्रयाधमनादिरूपाः सर्वाः क्रियाः)

In respect of judicial acts, the general principle of finality and the exceptions to it are declared by Manu in two verses (233 and 234) of Ch. IX. ' Whatever is *Tirita* or *Anusishta*, the king shall regard as done (final) and shall not allow it to be revised or re-opened ; but if the ministers or judges have ' improperly ' done it, the king shall himself do it and punish the judges.' The other relevant provision in Manu is contained in VIII. 117 which says ' in all litigations in which the evidence given is discovered to be false, whatever has been done must be treated as not done and the thing must be done again.' Verse 234 of Ch. IX may be said roughly to correspond to appellate or revisional intervention. Verse 117 of Ch. VIII which is the analogue of the modern law as to fraud upon the Court has been interpreted as applicable both to pending proceedings and tc completed proceedings. Before discussing the scope and the effect of these rules, it will be convenient to refer to the fuller provisions contained in the later Dharma Sastras. Some rules as to *Vadahani* have been stated even in Manu ; but its consequences have not been elaborated—especially as to whether every one of the various causes leading to *Vadahani* entailed an adverse and final decision of the litigation. Narada provides in II. 32 for four classes of *Avasannas* and in 33 for five kinds of *Hinas*. Commenting on these, the Bhashya of *Asahaya* draws the distinction between those whose case is not to be taken as finally concluded and those who have no further

right to litigate. The Mitakshara says that in the former class of cases, there will only be a *Hinapatra* (something like an order for default) and not a *Jayapatra* (a decree). The matter is dealt with at some length by Katyayana (in the passages I have already referred to) ; according to him *Vadahani* will not of itself involve a loss of the rights of the party except in cases in which the text expressly enacts *Arthahani* to be the consequence. A text of Brihaspati specifically provides for relief in cases in which a person is unable to appear in time through no fault of his own. Commenting on Kat. 100 and 101, the *Vyavahara Nirnaya* suggests something in the nature of an *ex parte* decree which may be set aside on the appearance of the defendant.

(हानिनिमित्त जयपत्रं दद्यात् एवं कृते यदिप्रतिवाद्यागच्छति पुनरपिव्यवहार दर्शनं कर्तव्यं.

Prof. Rangaswami Aiyangar's edition, p. 29).

Whether a procedure by way of " review " in our modern sense was available at all depends on the true interpretation of two verses. One, a text of Katyayana (221), broadly provides that a person cannot claim to adduce better evidence after a case had been decided against him on the evidence which he chose to adduce.

(क्रियांबलवतींत्यक्त्वादुर्बलांयोऽवलंबते । सजयेऽवधृते सभ्यैः पुनस्तांनाप्नुयात्क्रियां ॥

The *Vyavahara Matrika* develops an argument founded on the use of the word *Tyaktva* (abandoned) in this verse, stating that it implies the *voluntary* abandonment of something known to the party

which could have been adduced by him even in the first instance. It says accordingly that this prohibition cannot extend to cases in which evidence whose existence has been mentioned but which could not be adduced at the time (because the witness had gone to a distant country) has become available after decision had been given on the evidence originally available.

(त्यक्त्वेतिबुद्धि पूर्वकत्यागावगतिः....यत्रचोपन्यस्तमेव बलवत्प्रमाणं परं च साक्षिरूपं दूरदेशस्थत्वेन च संप्रतितदधीन निरूपणासामर्थ्येन दुर्बलसाक्षि निर्णयोजातः तदनन्तरं च देयत्वेन बलवत्साक्षिसमागमे तैरेव निर्णयः कार्यः) ।

The other text is a passage of Narada (Ch. I, 62 and 63). Commenting on this passage, *Asahaya* and another commentator lay stress on the reference to the evidence having been already mentioned and they point out that such previous mention repels the suspicion of subsequent fabrication. They accordingly says that evidence of which mention had already been made could be produced even after the decision if the omission to adduce it at the proper time was due to forgetfulness, impossibility, etc. (Prof. Jolly's translation on p. 21 of S.B.E. XXXIII, does not seem to fit in with Asahaya's commentary though he refers to it). If this interpretation of the passages in Narada and Katyayana is not to prevail, there is no other provision for a review on new evidence. Another text attributed to Narada and Katyayana declares in very general terms that a king shall not permit to be done anything which is opposed to the Srutis or the Smritis and which is not beneficial

to the people and adds that if any such thing has been done the king shall set it right.

(श्रुतिस्मृतिविरुद्धं च भूतानामहितम् च यत् । नतत्प्रवर्तयेद्राजा प्रवृत्तम् च निवर्तयेत्) ॥

The concluding direction (contained in the last foot of the verse) has been understood by the *Vyavahara Matrika* and by the *Smriti Chandrika* to refer even to judicial proceedings. If so interpreted, this text would give a very wide power of review to the king.

There is an obvious difference between producing new evidence on the same side—the case so far dealt with—and producing evidence of the kind contemplated in Manu VIII. 117, that is, evidence directed to show that the witnesses who deposed at the original hearing (presumably in favour of the opposite side) were false witnesses. Under our present system of law, a party may not be permitted to impeach an adverse decision, by a separate suit, on the ground that it was based on perjured or fabricated evidence. The Hindu Law seems to have proceeded on a different view. (For a discussion of different views on the subject even in modern law, see the judgments in I.L.R. 41 Mad. 743 (F.B.). The Mitakshara interprets Manu VIII. 117 to mean that the false witnesses should be punished and the case re-heard.

(कूटसाक्षिणश्च दण्डयित्वा पुनर्व्यवहारः प्रवर्तनीयः)

Where a wrong decision has been pronounced through the fault of the Sabhyas, Katyayana (81) provides that the king should not disturb the decision as between the litigants but the Sabhyas should be ordered to make good the loss to the

defeated party. This verse seems intended to deal with a doubt arising on some of the earlier authorities but the position is left unchanged because of a difference of opinion amongst the commentators as to the correct reading of this text. In the *Danda Viveka* (p. 339) it is pointed out that some commentators read this verse of Katyayana as using the word *Pra Vicharayet* while others would read it *Na Vichalayet.* The two readings will give diametrically opposite meanings. Two texts of Yagnavalkya (II. 4 & 305) provided punishment for the Sabhyas and even for the successful party in certain cases of miscarriage of justice. The second of these verses used the word *Punar Drishtva* (after enquiring again). A third text (Yag. II. 306) however said : "if a person even after he has been duly defeated considers that he has not been defeated and comes forward again he shall be defeated again and be made to pay a double penalty."

(योमन्येताजितोस्मीति न्यायेनापि पराजितः । तमायान्तम् पुनार्जित्वा दापयेद्द्विगुणम् दमं)

A text of Narada (I. 65) declared "if a man is of opinion that a suit has been decided or punishment declared in a way contrary to justice, he may have the cause tried once more if he pays a double penalty." It was realised by the commentators that these texts were not quite reconcilable with Manu IX. 233. The *Manvartha Muktavali* said that Manu's text only meant that the decision should not be disturbed "without reason" ; so also the *Smriti Chandrika.* Medhatithi qualified Manu's text by importing the exception "except on payment of double penalty" on the strength of

Narada's text. Yag. II. 305 seems to be in the nature of a provision for an appellate jurisdiction exercisable by the king. In terms, it assumes an apparent miscarriage of justice by the use of the word *Durdrishtan* (wrongly dealt with). In such cases, the Mitakshara expects the king to look into the whole matter again.

(पुनः स्वयम् राजा सम्यग्विचार्य)—

It adds that where miscarriage of justice has been caused by witnesses, it is they that should be punished and not the Sabhyas or the successful party. The commentators endeavour to show that verse 305 is not a mere repetition of verse 4. As regards verse 306, they refer it to a case in which the defeated party seeks to re-open the matter *without any justification* (*Hatat*). Does the expression *Punar Jitva* in this verse imply that on payment of the double penalty the whole case has to be re-tried or will it be open to the other party to plead the former judgment and insist on sufficient cause being shown before re-opening the matter? The Mitakshara comments " bringing about a second defeat in accordance with Dharma."

(धर्मेण पुनः पराजयं नीत्वा)—

This is not very informing. The general language of Narada's text would seem to imply a right to a second trial even in such cases. If so, the operation of the principle of finality would to that extent be qualified. *Apararka* says " the litigation can be enquired into again only if the party complaining agrees to payment of the double penalty."

(द्विगुणदमांगीकारे सत्येव तदीयोव्यवहारः पुनर्द्रष्टय:)

Vijnaneswara limits Manu IX. 233 to prohibition of re-opening by the king *for his own financial benefit and for other similar causes* (*Lobhadina*), that is when no doubt is raised as to the justice of the decision; some verses of Katyayana seem to tend in the same direction. Verse 294 makes a *Paschatkara* examinable by the Court before which it is produced and that Court is asked to reject it if it would not stand the test of reason (*Cf.* also, a verse quoted as of Narada in Dharmakosa I. 549 which runs as follows : " What has been decided without witnesses (to support it) or decided by wrong method or by people whose mind was not properly applied to it deserves to be re-investigated."

असाक्षिकं तु यद्दृष्टं विमार्गेण च तीरितम् । असंमतमतैर्दृष्टं पुनर्दर्शन मर्हति ॥

Commenting on Katyayana's verse, the *Vivada Chandrika* says that if the previous decision does not conform to (or constitute) *pramana* (authority) then there is to be re-enquiry even without payment of double penalty. Narada I. 50, is obscure. As explained by *Asahaya* it probably means that even on condition of payment of double penalty, there can be only one review and not successive repetitions of the process.

(न पुनः पुनरपितान्येवापदिशेत्)

A verse of Brihaspati repeated by Katyayana (496) is relevant here but it may be more conveniently dealt with when discussing appellate jurisdiction. Verse 295 of Katyayana corresponds to but is wider than Manu VIII. 117.

The words *Tirita* and *Anusishta* used in Manu IX. 233 and Narada I. 65 are interpreted in one

way by most of the commentators but Katyayana defines them in a different way (see verse 495 and Mr. Kane's foot-note to it). I do not go into this difference as I do not see any question of principle turning on it. There are two other verses of Narada (II. 40 & 41) which like Kat. 208 and 209 introduce another distinction. They say "when a man has lost his cause through the dishonesty of witnesses or on account of the judges, the cause may be tried anew. When however a man has lost through his own conduct, the trial cannot be renewed. One convicted by his own confession, one cast through his own conduct and one whom judicial investigation has proved to be in the wrong (these three) deserve to have their final defeat declared at the hand of the Judges." (S. B. E. XXXIII, pp. 34 and 35). These verses enact an exception to the previous rule (contained in Narada I. 65) about the right to re-trial on payment of double penalty.

Before referring to the texts which provide for what is really in the nature of the exercise of appellate powers, it may be useful to take note of the history of appellate jurisdiction in other systems of law. Under a republican regime, the "people" would be the highest authority: and when, as in Athens, the people, *i.e.*, the Heliasts pronounced a decision, there could be no appeal to any higher authority. In early Rome, the consular imperium was derived from the people and the people alone could decide questions of life and death of citizens and even cases of fine when the fine imposed was large or persons who held high office were involved (Str. Dav. I, p. 127). This was probably done on

an appeal by the prisoner against the sentence pronounced by the magistrate. What the people did was not so much a decision on the law or on the evidence as the exercise of a right to remit the sentence, if they thought fit. (Mr. Strachan-Davidson does not accept Sir Henry Maine's theory that a criminal trial in early Rome was in the nature of a delegation of legislative power by the Comitia). Under a regulation of Sulla, the practice in capital cases was that the people by a *lex* sentenced before-hand a certain class of criminals to death, making the sentence conditional in each case on the finding of a prætor and jury that a particular man was guilty of the offence charged. Republican usage distinguished between *provocatio* and *appellatio* : the first was the privilege assured to the burgess by the Valerian Law that he may bring his claim for mercy to the bar of the people ; the second was the process by which a colleague (one of the consuls) or a tribune was entreated to interpose his protective authority for the private man against magisterial acts. Under the Empire, the emperor took the place of the "people" as the ultimate authority : as the *princeps*, he was also the colleague of other magistrates and a request for intervention addressed to him would be in the nature of appellatio. Thus, the two processes (*provocatio* and *appellatio*) became one. The Imperial Court of Appeal may not only cancel the sentence of the Court below but substitute a fresh sentence in its place (Str. Dav. II., p. 176). Under the formulary system, there was no such thing as an appeal : there might be *restitutio in integrum* where a judgment was obtained by threat or

fraud ; but there was no power to take the case before a higher tribunal on the ground that a decision was wrong. All that could be done was to utilise administrative machinery (by way of proceedings for *Calumnia*) on proof that the claim was in bad faith (Buckland, Manual of Roman Private Law, p. 375). In *cognitio*, appeal soon became a rgular process and the higher Court not only quashed the decision of the lower Court but substituted its own.

In monarchical regimes, like that which prevailed among the early Hebrews, the king acted as a Superior Court : those who were not satisfied with the decision of the inferior Courts could appeal to the king. They also carried cases directly to him, especially in important or difficult matters. With the centralisation of the judicial system, the king's officers came to be regarded as superior to the local magistrates who derived their authority from the community (His. Jur., p. 101). In England "appeal" was not known to the Common Law. A graduated hierarchy of Courts existed only in the ecclesiastical system ; and from it, the king's Court later borrowed the idea through the Chancery (P. & M. II., p. 664). When the king himself employs his subordinates to hear complaints or redress grievances, he may reserve to himself the power of reversing their decision (Herbert Spencer, Pol. Inst., p. 596). Early legal history was not aware of the two conceptions now associated with appellate jurisdiction ; namely, (1) that the appeal lies on the ground that the decision is erroneous and (2) that the appellate tribunal

re-hears the case (H.E.L.I., pp. 213—217). By the Common Law and Statute, the defeated party in a jury trial could "attaint" the jury and have his case tried before a superior jury, with the result that if he won, the first jury was punished for perjury and the judgment reversed; if he failed, he was liable to fine and ransom. The practice was not popular and disappeared by the end of the sixteenth century. Then came the practice of the Court granting new trials where there has been an apparent miscarriage of justice owing to the failure of the jury to apprehend the true effect of the evidence (Dr. Jenks in Cambridge Legal Essays). In respect of the local Courts, both feudal and communal, it became the established practice at an early date that only the king's Court could hear a case of "false judgment" (P. & M. I., p. 590).

Reading the provisions of the Dharma Sastras in the light of the above information, the distinction between two sets of provisions is noticeable, one set of texts providing for the king's intervention to remedy injustice and the other recognising a gradation or hierarchy of Courts with the king at the apex. Manu IX. 234 and Yag. II. 305 belong to the former category. Their language is in terms applicable to what I have called the "King's Courts" *i.e.*, the official Sabhas. Though I have endeavoured to show that the Sabha represented an ancient institution and was not exactly a creation by the king, the right of the king to preside over it and the delegated authority of the *Pradvivaka* (when he presided over it) may justify the implication of a reserve

power in the king to set right any injustice caused by their decision. The provisions for punishment of the Pradvivaka and the Sabhyas may be compared with what obtained under the English practice relating to "false judgment". The texts do not seem to contemplate that in this class of cases, the appellant should be subjected to any fine or penalty if the appeal does not ultimately succeed. It may also be noted that in the first category of cases, the matter is asked to be looked into by the King himself. Manu's text says—

स्वयं नृपतिः कुर्यात्

and Yagnavalkya says

पुनर्दृष्ट्वा....नृपेण सभ्याः दण्ड्याः

The second category of cases falling under the first head is where a man even without justification imagines that he has not had justice done to him. This is dealt with in Yag. II. 306 and Narada I. 65 (already referred to). Referring to these two sets of provisions, the Smriti Chandrika distinguishes the class of cases in which a man can ask for re-investigation when there appears in the judgment a *Nyaya Abhasa* (miscarriage of justice) and cases where the decision being on the face of it right the man can question it only on penalty of double fine. It is not clear whether the texts intended to draw a distinction between *Drishtva* (the king looking into it) and *Uddharet* (the king shall revive it). In the latter case, the assumption seems to be that there will be a new trial. The Smriti Chandrika says, "thus a re-enquiry with penalty can take place only before a later Sabha presided over by the king because

the king alone can impose a penalty. In a Sabha not presided over by the king only re-enquiry without penalty can take place. * * * * The later Sabha must be greater (bigger) than the former Sabha. Otherwise, the doubt (as to the correctness of the former judgment) will not be removed."

एवं सदण्डः पुनर्न्यायः सनृपोत्तरसभायामेव, नृपस्यैव दण्डने अधिकारात् । नृपरहितायां तूत्तरसभायां दण्डविरहितः पुनर्न्यायः कार्यः....उत्तरसभया च पूर्वसभातः ज्यायस्या भवितव्यमन्यथा संदेहानिवृत्तेः ॥

The Vyavahara Prakasa, commenting on Narada's verse, interprets the words *Tat Karyam Punar Uddharet* to mean that "he shall have the matter decided by starting an enquiry with all the four divisions" (*i.e.*, just like a regular suit).

चतुष्पाद्व्यवहारप्रवर्तनेन निर्णाययेत् ।

This is confirmed by a text of Brihaspati which says "deciding the case with the help of several learned Brahmins, the king shall punish the originally victorious party as well as the previous Sabhyas who have been found to be in the wrong."

निश्चित्य बहुभिस्सार्धं ब्राह्मणैश्शास्त्रपारगैः । दण्डयेज्जयिना सार्कं पूर्वसभ्यांस्तु दोषिणः ॥

As regard decisions pronounced by the Sabha presided over by the Pradvivaka, there will be little difference between the operation of the above provisions relating to the intervention of the king and the operation of the other set of provisions relating to the hierarchy of Courts, because even

under the latter set of provisions, the appeal from the Sabha would be to the king. When however the impugned decision is that of one of the inferior Courts, a possible divergence in the operation of the two sets of provisions will become noticeable. For instance, a verse of Brihaspati which is repeated by Katyayana (496) says "where a party is not satisfied with the decision given by Kula, etc., the king shall look into it and if it has been wrongly done he shall have it set right".

कुलादिभिर्निश्चितेऽपि न संतोषं गतस्तु यः । विचार्य तत्कृतं राजा कुकृतं पुनरुद्धरेत् ॥

If this is to be read merely as stating the effect of the other provision, found as early as Yagnavalkya, to the effect that among the various tribunals enumerated, the earlier-enumerated is superior to the later enumerated, the result would be that from the Kula there would be an appeal to the *Sreni*, from thence a second appeal to *Puga*, thence again a third appeal to the Pradvivaka's Court and finally an appeal to the king. Differently read, the verse may imply a direct appeal to the king from the Kula. A comment of Viswarupa on Yagnavalkya states that every suitor has a right ultimately to go to the king.

यश्चायं व्यवहारमार्ग उक्तः तत्र सर्वस्मिन्नेवायं राजाश्रयस्साधारणो विधिः

A text of *Pita Maha* cited in the *Vyavahara Nirnaya* (p. 15) says " matters enquired into by Kula. etc., shall in the event of the dissatisfaction of the party be successively re-heard (by other tribunals) till they reach the stage of an enquiry by the king."

कुलादिभिः कृतं कार्यं विचार्यं तद्यथोत्तरम् । असंतुष्टस्य कर्तव्यं यावद्राज्ञा कृतं भवेत् ॥

and this is introduced by the author of the *Vyavahara Nirnaya* with the words "it is only proper that there should be a re-enquiry in respect of matters not enquired into by the king" (or by a tribunal presided over by the king).

अनृपात् पुनर्दर्शनं युज्यते ।

It is not possible to say whether the rule as to "double penalty" applied to one who complained against the decision of one of the inferior Courts.

One text of Narada (stated by some commentators to be repeated by Katyayana but not reproduced in Mr. Kane's edition, *Cf.* verse 295) remains to be noticed. It says "when another ruler has in his ignorance done something not consistent with justice that must also be set right."

न्यायापेतं यदन्येन राज्ञाज्ञानकृतं भवेत् ।
तदप्यन्यायविहितं पुनर्न्याये निवेशयेत् ॥

This verse perhaps has reference to a decision by a provincial head or subordinate ruler and provides that it can be set aside by the king (meaning the Suzerain). A text of *Pita Maha* says "once a matter has been disposed of by the king himself there is no upsetting it even if it had been wrongly done".

राज्ञा दृष्टः कुदृष्टो वा नास्ति तस्य पुनर्नयः ॥

To reconcile this with Narada's text, the Smriti Chandrika says that the passage in *Pita Maha* must be understood to relate to a situation where no superior king or royal assembly is available.

The Mitakshara speaks generally of what has been done "by another king" (*Nripantarenapi*) being set right by the king. Taking Narada's verse with an earlier one, the Vyavahara Matrika states the result as follows, "what he (the king) has himself done without conforming to the Sastras or what another ruler has ignorantly done, such litigation shall be directed to be determined again in the manner consistent with Sastras".

स्वयं वा अशास्त्रतो निरूपितं नृपत्यन्तरेणवाज्ञानकृतं व्यवहारं शास्त्रविहितेन वर्त्मना पुनर्निरूपयेत् ॥

It will thus be seen that while the principle of finality of a decision was not ignored numerous ways were provided for remedying possible injustice. In view of the conditions of the time and the variety and character of the several tribunals functioning, this was as it should be. But the provisions as to the king's intervention marked the definite establishment of "king's justice" in the land.

[NOTE.—A *Jayapatra* answering to the description given in Brihaspati's text has been stated by Mr. Jayaswal to have been found in a village in Darbhanga and it is said to bear a date corresponding to 1794 A.D. A Jayapatra of similar form and belonging to the middle ages has been referred to by Prof. Jolly as found in Java (see Jolly's Hindu Law and Custom, p. 319). It may be interesting to compare this form of Jayapatra with the forms of decisions that obtained in other early systems of law. In his book on Babylonian and Assyrian Laws (Ch. VI) Mr. Johns has given examples, from recent finds, of legal decisions

of Babylon and Assyria. Baillie's Digest of Muhammadan Law (Ch. VII) gives detailed information as to the form and contents of judgments according to the requirements of the Muhammadan Law].

41. Coercive Authority of Courts.

In the sphere of law, the coercive power of the state today has a two-fold aspect ; one is the attachment of obligatoriness to its commands (laws), the other is the enforcement of obedience to those commands by punishing breaches. The legislature represents the former aspect and the Courts the latter. In societies where law was in the main believed to derive its authority from a higher power than the state, the function of the state was only to enforce the law. The administration of justice in its completeness means the maintenance of right by means of the physical force of the state. The employment of the force of the state to enforce the decision of its Courts is the result of the growing contact between the royal authority and the popular courts. The king's justice has the advantage not merely of greater perfection of method (*e.g.*, regularity, exactness, impartiality, etc.) but also of its execution by the king's officers. In early societies, courts of justice do not appear to have been armed with powers of directly compelling attendance and submission. Only sovereign power could give operative jurisdiction to courts of justice ; otherwise, law must only rely on the aid of public opinion and submission will be more to arbitration than to a Court. (E. H., p. 280). Procedure began to develop at a time when the element

of public compulsion was absent or insignificant. The transitions from a legalised struggle to arbitration and ultimately to full jurisdictional authority are very gradual (Vin. His. Jur. I, 350). With the growth of the authority of the state, justice instead of proceeding from a voluntary contract is imposed from above and the official no longer merely supervises a submission to arbitration but sees that the rules laid down by public authority are enforced. The aim of the early codes of law was to induce men to submit to the decision of a Court instead of helping themselves to what they deemed to be their rights. Often, the attempt was not so much even to arbitrate between the parties as to secure the observance of rules which would prevent the individual helping himself without the sanction of the Court. (H.E.L. II, 99). The coercive action of the law is directed (i) to compelling a plaintiff to come to Court and not to resort to self-help and (ii) to compelling the defendant (*a*) to appear in answer to the summons and (*b*) to obey the judgment.

42. Compelling appearance of parties.

Dealing with the course of development in the Roman Law, Mr. Jollowicz says, "in the older system, it was the business of the plaintiff to get the defendant before the magistrate. In *cognitio* the state official began to take a part not only in the trial but in the summons. The magisterial *evocatio* which signified the right of the higher magistrates to order a private individual to appear before them now came to be used at the instance of a private individual as a method of beginning a

private action. Disobedience to *evocatio* was an offence and one way of dealing with the offence was to try the case without the defendant. Mere absence did not involve adverse judgment but the judge could decide the case in the absence of the defendant"(Historical Introduction to Roman Law, p. 404). The result of the change was that the notion of jurisdiction as resting on consent and the conception of *litis contestatio* as a contract disappeared (Buckland's Manual of Roman Private Law, p. 387). The passage to be presently cited from Holdsworth describes the procedure in England during Anglo-Saxon times. The position in the English Law during the Middle Ages is thus described by Pollock and Maitland : In civil proceedings the writs indicated the steps to be taken, such as summoning, attaching, distraining, arresting. The sheriff acted as the court's minister for these purposes ; but the process was slow. In real actions, there could be judgment by default, adjudging the property in dispute to belong to the plaintiff. In personal actions, there could be no judgment *in absentia* (History of English Law, pp. 581-593). In a real action, the process to get a defendant before the Court consisted, when reduced to its lowest terms, of summons, seizure of land into the king's hand and judgment that the land be handed over to the demandant * * * It was open to the tenant to re-open the whole dispute by means of a writ of right (H.E.L. III, 624).

One of the commonest forms of self-help in early law was distress ; and it served both as a means of satisfying the creditor's claim and as a

method of compelling the opposite party to come to court. In the development of modern remedies out of this primitive practice of violently seizing property in redress for supposed wrong, two alternative expedients were adopted ; (*a*) to tolerate distraint so far as it served to compel the submission of the defendant to the jurisdiction of the Court, and (*b*) to incorporate distraint with a regular procedure, *i.e.*, after the claimant obtains an adjudication. In a still more advanced condition, the tribunal takes the seizure of land or goods into its own hands. It resorts to coercion before judgment only on rare occasions. (E.H. p. 278). The *manus injectio* was the Roman mode of execution against the person of a judgment-debtor. The *pignoris capio* was a mode of execution against property ; it was originally a wholly extra-judicial proceeding but later it followed a decree.

In early society, it seems to have been been common for both disputants to agree to submit their disputes to the decision of a tribunal. Speaking of the Babylonian and Assyrian Laws, Mr. Johns says, " generally, both parties seem to have agreed to submit their case to a judge and gone to him : there is little evidence of an unwillingness to submit. Occasionally, a party is said to have brought the other before the judge or caused him to come. The Judges sometimes had to summon a party before them " (Babylonian and Assyrian Laws, pp. 87, 88). If in course of time a procedure had to be developed to compel the attendance of an unwilling defendant, it was equally necessary in the interests of public order to prevent an aggressive claimant or complainant from taking

the law into his own hands (*a*) when he had no just claim and (*b*) even in enforcement of a true claim. Taking the law of debt for instance, it would appear that as early as the code of Hammurabi, a person who seized another for a debt when in fact nothing was due was liable to a fine. In the introduction to his translation of the laws of the ancient Persians (at p. 43, etc.) Mr. Bulsara says that the Court sometimes directed an aggressive claimant to deposit in court a certain amount as security against his taking the law into his own hands before the Court gave its decision. If he attempted to eject the man in possession, the security will be forfeited and sometimes even the right itself. In Greece, where distress was available for the enforcement of compensation for delicts, the defendant was entitled to use force in opposing an unjust distress ; but he did so subject to the proviso of subsequent justification (Vin. His. Jur. 246). In the early Roman Law, the right of the creditor to help himself (*per manus injectionem*) was limited by the recognition of a right in the debtor to resist seizure if the factum of debt had not been already adjudicated on. It was only if the claim was founded on a judgment that the officer of the state would lend his force to compel submission. In Rome (it has been said) the Prætorian Law developed as a system working against the principle, of self-help, by means of interdicts which were intended as a substitute for juridical self-help (Vin. His. Jur. II, 59).

Like other ancient systems, the Hindu Law, even while permitting the creditor to take extra-

judicial steps for the realisation of his debt, limited his right to cases where there was no dispute about the debt. Where there was a dispute, the debtor had the right to take the matter before the Court if the creditor insisted on proceeding extra-judicially. Katyayana (589) says that a creditor who harasses a debtor when the latter claims an investigation by a Court would lose his claim and would incur a fine. Referring to the corresponding provisions in Brihaspati, Mr. Kane (in his foot-note to Katyayana) takes the result of the provisions to be that where there was a dispute about the debt the creditor's only remedy was a law suit. The broad proposition that a person should not take the law into his own hands was clearly laid down by Yagnavalkya (II. 16). In introducing this verse, Viswarupa expresses the principle in very apt language. He says, "when however as between the two disputants, one may be able to realise his claim by his own strength, that is without even informing the king, the question arises, is it necessary that even in such a case he should resort to the king: the answer is afforded by the text of Yagnavalkya: the intention is that just as a person who runs away when summoned by the king or one who appearing before the king would not say anything of what he knows is to be treated as a defeated party and punished accordingly, even so, a person who, without waiting for the adjudication by proper means of a claim which is disputed by the other side, takes steps to enforce it by himself by force must be treated as a defeated party and punished accordingly."

यदा पुनः द्वयोर्व्यवहारविप्रतिपत्तौ स्वबलावष्टंभेनैव अन्तरेणापि राजवेदनं साधयितुं सामर्थ्यं स्यात्तदापि किमवश्यं राज्ञ एव-निवेदनीयं सत्यमेवं युक्तं यतः संदिग्धार्थमित्यादि। यथैव राज्ञाहूतो निष्पन्नेद्यो वा राजान्तिकं गतः संभावितप्रतिभावानपि न किंचिद्वदेत् स यथा पराजितः दण्ड्यश्च स्यादेवं योऽपि प्रत्यर्थिसंदिग्धं न्यायेन निश्चयम कृत्वैव हठात् स्वतन्त्रः साधयेत् सोऽपि पराजितः दण्ड्यश्चेत्यभिप्रायः ॥

The *Vira Mitrodaya* is even clearer as it interprets the word *swatantra* in the passage to mean "without waiting for a decree given by the Judge."

(विचारकदत्तजयपत्रादिनिरपेक्षः)

The substance of Yagnavalkya's verse has been repeated in Narada (I. 46). Kat. 120 has been the subject of diverse interpretations. The natural meaning (adopted by Mr. Kane) seems to be that a litigant who has seized property or money belonging to the opposite party should not be allowed to proceed with his suit unless he hands over the property or money to the other party or to mediators. This is also the interpretation adopted by the *Smritichandrika*. This will be another limitation upon a person's right to resort to self-help.

As to the way of bringing the defendant before the Court, it is not unlikely that at one time the plaintiff was expected to take the defendant before the Court : and in all proceedings which are in effect in the nature of submission to arbitration, both parties must have voluntarily appeared before the tribunal. Provisions are however also found from early times for dealing with recalcitrant defendants. In Athens, the summons was generally

served in person by the plaintiff who took with him two or three witnesses. If the defendant failed to appear in spite of such service, the case went against him by default unless he could afterwards show sufficient cause for his absence. If the defendant was an alien and there was a likelihood of his fleeing the country in order to avoid the trial of the case, the plaintiff could arrest him and bring him before the magistrate (His. Jur. p. 179). In the Roman system, it would appear that according to the Twelve Tables (Table I, rules 1-3) a plaintiff can arrest in the presence of witnesses a man who refuses (when called) to go to a magistrate and take him by force. If the defendant be prevented by illness or old age, he must be taken on a beast of burden. After the introduction of the formulary system, the defendant was not obliged to accompany the plaintiff immediately to the presence of the magistrate but had only to appear on the appointed date. When summoning the defendant, the plaintiff had to make it clear to him what the claim was (Jol. p. 202). According to the procedure prevailing in Justinian's time, the plaintiff had to undertake (with security) to bring the matter to a *litis contestatio* within two months, failing which he must pay the defendant twice the amount of the cost occasioned by the omission to prosecute the case to the end and to pay one tenth of the sum at issue in case judgment went against him. The magistrate examined the statement of claim and if he found it correct on the face of it, it was ordered to be served on the defendant by an officer of the court. The defendant had to undertake (with some security) that

he will appear in court and remain there until the end of the trial. Failing security, he may be imprisoned. He must put in an answer; if the defendant failed to appear, proceedings *in contumaciam* may be taken and, if he continued absent, judgment finally obtained against him.

The practice in Anglo-Saxon times is thus described by Sir W. Holdsworth: the plaintiff summoned the defendant; if the accused or defendant neither appeared nor showed a valid cause for absence, a fine was imposed and steps taken to compel appearance. The summons was repeated thrice and successive failures entailed increasing fines which could be levied by distress. If the process of distress produced the defendant, he must give security for his further appearance and submission to the Court. If he declined to do this and if he was a suspected person, he could be retained in custody. If the process of distress did not produce the defendant, the plaintiff might in simple cases or in cases punishable by money fines proceed to realise his claim. In the more serious criminal cases, the contumacious person might be outlawed. There was no power to try any case in the absence of the other party. This rule was perhaps founded upon the idea that recourse to the law Courts depended upon the consent of the parties (H.E.L. II, p. 103). Even at a later period, in the Courts of both Common Pleas and King's Bench, the arrest (of the defendant) was normally a first or almost a first step in procedure in an action. . . . . The institution of the proceeding *coram judice* depended in legal theory on bringing the defendant bodily before the Court just as much

as the satisfaction of the judgment, when given, depended in taking his body by way of *ca-sa* until he paid. (Per Scott, L.J., in *Leachinsky* v. *Christie*, All. E.R. (1945) 2 at pp. 402-403).

With the above practices that prevailed in other systems, the provisions of the Hindu Law may be usefully compared. The later Hindu Law texts expressly mention a *Purusha* or *Sadhya Pala* as one of the constituent elements of the Court and it was his duty to bring (and if necessary detain) the parties and witnesses. They also expressly provide for the defendant being summoned by the king's *Mudra* or seal through the *Purusha*. The *Balam Bhatti* says that the word *Mudra* is intended to include anything in writing.

मुद्राग्रहणं लेख्यस्याप्युपलक्षणम् ।

This is referred to as *Ahvana* (call or summons). Though there is no express mention of *Ahvana* in the earlier texts, they seem to imply one even when they speak of *Asedha* (constraint), because *Asedha* is said to be a restraint imposed by the plaintiff on the would-be defendant "pending a summons from the king or the court." This is made clear by Narada (I, 47) who refers to the constraint "pending the arrival of the *Ahvana*."

यावदाह्वानदर्शनं

Apararka would interpret *Ahvana* here as referring to the peon himself instead of the summons sent through him. The *Vyavahara Nirnaya* would make *Ahvana* mean the *vyavahara* itself and it interpreted *Ahvana Darsana* as "enquiry into the litigation" thus suggesting that the *Asedha* or constraint could be continued till the dispute is enquired into.

Asedha is provided for at least as early as the *Gautama Smriti.* Katyayana uses strong language when he says "if a person commits a crime or does not perform his obligation *** he should be dragged (to the Court) by order of the king" (28 & 103). He follows this up by saying "after informing the king of the matter, the claimant may employ restraint (of the defendant) till the arrival of the summons" (104). This is interpreted by the *Vyavahara Prakasa* as follows: "If the complainant desires to go to the king to make the complaint or if after he had made the complaint there is delay in the king, by reason of his attention to other work, sending a summons, the complainant may in the name of the king restrain the other party; this is called *Asedha.*"

आवेदनाय जिगमिषता कृतावेदनेन वा कार्यान्तरवैयग्र्यादिना राजाह्वानविलंबे राजशपथादिना प्रतिवादिनः प्रतिरोधश्च आसेधापर-पर्यायः कार्यः ।

This provides a wide power of compulsion—being wider than the Mitakshara definition which only refers to constraint "by order of the king." In either case, the detention rests on the authority of the ruler, either actual or assumed.

Asedha may be of the person or of the property of the defendant. Narada (I, 48) classifies *Asedha* under four heads; they are all personal. Another passage quoted in the *Vyavahara Nirnaya* (p. 31) as of Narada provides for *Asedha* of the subject-matter of the dispute; and the next verse provides for restitution in the event of the plaintiff's failure in the suit. For a fuller discussion of the nature

of *Asedha* reference may be made to a long extract from the Saraswati Vilasa set out in the Dh. K. I., pp. 107 and 108, where the difference between *Asedha* and *Akrosa* (referred to in Vishnu) is also explained. It may be broadly stated that *Asedha* will include many of the interim remedies known to modern procedure, like attachment before judgment, arrest before judgment, injunction and even receivership.

Both in respect of *Asedha* and *Ahvana*, there were elaborate provisions as to who could not be subjected to them, *e.g.*, sick and bereaved people, persons subject to infirmities like minority, madness, etc., woman, and so on (Kat., 107-110) and what should be done in such cases. Detailed provisions are also found prescribing punishment for disobedience to summons, increasing the severity of the punishment with each repetition, for violation of *Asedha* by the defendant and for misuse of the *Asedha* by the plaintiff. A text of Vyasa quoted in the *Smriti Chandrika* contemplates the possibility that the defendant may be unable to attend by reason of causes beyond his control. In such cases, it provides that he shall not be punished but a second summons (*Punar Ahvana*) must be sent (Dh. K. I. 134). Kautilya and Katyayana make specific provision for feeding and paying batta to the peon during such time as his presence or services may be required (*Arthasastra* III, Ch. 1, Kat. 112 & 113). As pointed out by Mr. Kane in his foot-note to Kat., 112-113, *Purusha* in the Arthasastra passage will be the appropriate term for referring to the court peon and not to a witness. Apart from these provisions for compelling the attendance of

the defendants, there is the passage (to which I have already referred) in the *Vyavahara Nirnaya* (p. 29 which provides for the passing of an *ex parte* decree if the defendant persists in absenting himself. Mr. Kane interprets Kat. 162 as in effect authorising an *ex parte* decree. He reads Kat. 194 as authorising a decree against the defendant who will not file an answer. Under Kat. 202, the defendant who fails to appear and the defendant who declines to plead also incur a penalty.

43. Summoning Witnesses.

The power of summoning witnesses seems to have been assumed (though not expressly provided for) in the Dharma Sastras as it is included among the duties of the *Purusha* or *Sadhyapala*. The Arthasastra expressly refers to this subject and says "parties shall themselves produce witnesses who are not far removed either by time or place: witnesses who are far away or who will not stir out shall be made to present themselves by the order of the Judges" (Bk. III, Ch. 2). Punishment has been prescribed in the Dharma Sastras for witnesses who would not give evidence (see Kat. 402-403) and the earlier texts referred to in the foot-note by Mr. Kane).

44. Execution.

When a decision has been pronounced by the court, there remains the process of execution to complete the course of the law. In early tribal jurisdiction, the enforcement was not effected as a rule by public authority but was left to a great extent in the hands of the individual litigant and

his friends. It amounted to little more than self-help judicially sanctioned. (Vin. His. Jur. I, 354). The Athenian law left the execution of the judgment in a civil case largely to the successful party; he might not imprison or enslave the defendant but he could seize the latter's goods (His. Jur. p. 179). In modern law, we think of execution as directed towards the fulfilment of the judgment; if the defendant will not himself do what he has been ordered to do, the state will so far as possible itself take steps to secure the desired result. That was not the standpoint or method of early law. Execution was then regarded rather as a method of putting pressure on an obstinate defendant in order to break his will and make him do whatever he ought to do. It was therefore directed almost exclusively against the person of the defendant.

As between creditors and debtors, the position in the early stages of the Roman Law was that the lender had the right to seize the person of the debtor. As this was found to be very uneconomic, there were two other forms of security, namely, holding of property or the taking of surety. In its primitive form, real security consisted in handing over a thing to the creditor to be returned when the obligation was fulfilled and forfeited if it was not. In *Manus Injectio Judicati*, the debtor might be kept by the creditor in a private prison for sixty days during which he can get release by satisfying the judgment. A law of B. C. 326 provided for debtors paying their debt not with their person but with their property, that is they can work off the debt. If the defendant wanted to impeach the

judgment, he must find a *vindex* prepared to undertake double damages in case of failure. After the formulary system came into vogue, execution of a decree might be effected either by personal seizure or by seizure and sale of the debtor's property. In the later days of the Roman republic, the principal remedy was not execution against the person but execution against the property of the judgment-debtor. The judgment-creditor had to take proceedings on the judgment after expiry of the days of grace. The debtor might plead satisfaction. He might contend that the judgment was invalid ; but before doing so he must furnish security and if he loses the case he will be condemned in double the amount of the original judgment. Execution against property was in the nature of bankruptcy. The creditor could not take just one piece of property sufficient to satisfy his debt and sell it. The debtor could escape execution against his person by making a voluntary surrender of his property to the creditors (Jol. pp. 187, 188, 219—222). By the time of Justinian, execution, like summons, became a matter in which the magistrate can use his powers of command and coercion. Execution by personal seizure of the debtor had ceased to be the practice. The officials of the court might be authorised to seize a sufficient part of the judgment-debtor's property and, after a delay of two months, sell it for the benefit of the creditor. Movables were to be taken first, then land, then, if necessary incorporeal assets. If the judgment was for the delivery of a specific thing, the officers of the Court seized it and handed it over to the plaintiff. (Jol. pp. 407, and 456-460,

see also Buckland, Manual of Roman Private Law, pp. 350, 375—385 and 309).

According to the old English practice, the judgment in a real action was executed by writs ordering the sheriff to deliver seisin. No action for damages in the sense now known, that is, for a sum to be assessed by the Court, existed. Money claims could be enforced by *fieri facias*, that is, raised out of the land, but not by sale of the land, because the lord might be interested in the land. The Common Law permitted debtors who could not pay their debts to be committed to prison by any creditor and the state assumed no liability to keep them from starvation. That was assumed to be left to the benevolence of any creditor who had caused the imprisonment (per Viscount Maugham in L.R. 1943 A.C. at p. 371). During the time of Edward I, Statute Law authorised a creditor to demand seizure and imprisonment of the debtor's body (P. & M. II, pp. 581, etc.).

Turning now to the Hindu Law, it must be said that the Dharma Sastras (and even the Arthasastra) do not specifically provide for any proceeding in the nature of execution. Speaking of the decision (*Nirnaya*) the texts use words like *Dapya* or *Dapayet* meaning "shall be made to pay"; similar language is employed even in respect of "fines." But the matter is not followed up by provisions as to realisation in the event of non-payment or non-compliance. Speaking of the successful plaintiff, Kat. 262 says that the plaintiff who is successful shall be honoured and shall be made to get what he had proved his claims to;

सिद्धेनार्थेन संयोज्यः वादी सत्कारपूर्वकं ।

but he too does not say how this is to be carried out. Verses 477—480 read like imposing upon the king an obligation to compel payment by sending the debtor to jail or making him work and not merely leave it to the creditor (even after a decree) to resort to extra-judicial method for realisation of his dues. The Mitakshara quotes these slokas with the introductory words "methods by which the king can compel payment are indicated."

राज्ञादापने च प्रकारा दर्शिताः ।

The causal form (*Karayet*) employed in Yag. II, 43, also seems (when the verse is read with 42) to contemplate action by the king to make the debtor discharge the debt by working for the creditor. Commenting on Manu VII, 49 which refers to the various ways in which a creditor may realise his debt, *Medhatithi* says that *Bala* (force) mentioned there as the fifth may refer to compulsion by the king.

(राजा निगृह्य च प्रपीड्य दापयतीति)

While, like all ancient systems, the Hindu Law may be said to be harsh to debtors, it had some very salutary provisions calculated to benefit both the creditor and the debtor. For instance, a verse of *Brihaspati* provides that if the debtor is a trader, he ought to be proceeded against after he had realised money by the sale of his goods; if a cultivator, after his crops had grown: and if the debtor is engaged in a sacrifice or marriage, he should be proceeded against after the completion of the business on hand.

वाणिग्विक्रीतपण्यस्तु सस्ये जाते कृषीवलः सत्रोद्वाहोद्यताश्चैव दापनीयाः कृताक्रियाः ॥

Even in respect of fines for crimes, a text of *Sankha-Likhita* requires that in the case of artizans, their tools, in the case of agriculturists, their implements of husbandry and cattle, and similar specified articles in the case of various other classes of people should be spared for them (Dh. K. I., p. 572).

The paucity of provisions relating to execution of decrees does not however seem to me to be attributable to the lack of coercive authority in the state : this surely was not the position at the time of the Arthasastra or of the later Dharmasastras. It is possible that the surety required by law to be taken from both the parties on their appearance was generally found sufficient to secure compliance with the judgment. It is of course conceivable that the surety too may not fulfil his obligation and legal proceedings may have to be taken against him ; but as there were elaborate directions as to the class of persons to be accepted by the Court as sureties and as no long interval was allowed to elapse between the initiation of proceedings and their termination, difficulties arising from the default or inability of the surety would not have been frequent. The texts under the heading "Suretyship" contemplate even a surety for appearance ; but Yag. II, 10 makes an express provision in respect of sureties to be found by the parties to a litigation. They are required to be

समर्थाः कार्यनिर्णये

(capable of meeting the judgment) which is explained by the Mitakshara as

साधितधनदाने दण्डदाने च समर्थाः ।

(capable of paying the money or fine found by the Court to be payable). The *Smritichandrika* defines the "capacity" as "capacity to pay without difficulty."

साधितधनदण्डधनयोरनायासेन प्राप्तिः कार्यनिर्णयः ॥

No surety was apparently necessary if the matter could be disposed of immediately. If sureties could not be found, the party who could not find one was to be detained by the court-peon (or in Jail). Kat. 117 reads as if there must have been an earlier sloka requiring sureties to be taken. Though Mr. Kane's edition does not contain any such verse, the *Dharmakosa* (I, p. 218) gives the following as of Katyayana.

प्रतिभूश्च गृहीतव्यः प्राड्विवाकेन कार्यिणः । प्रत्यर्थिनि समायाते समुपस्थापनक्षमः ॥

(The Judge shall take from the plaintiff a surety for his appearance when the defendant appears). With reference to Kat. 120 (which I have cited in another connection), a verse of Narada (numbered as 15 on p. 235 of S. B. E. XXXIII) is worth noting. It provides that whatever property movable or immovable has been kept (under the care of the judge, after having become the subject of dispute) must be handed over to the victorious party.

The coercive power of the inferior courts is one of greater uncertainty. Historical evidence undoubtedly suggests that the power of the state was behind these courts when necessary. One way in which this could be justified on the texts is by adopting the suggestion of the *Subodhini* that the

reference to *Raja* (King) in the passages relating to *vyavahara* is to be treated as *Upalakshana* (standing) for *all* courts and that therefore the provisions relating to the royal Courts are applicable to the inferior courts also. Mr. Altekar (V.C.W. I, p. 44) derives the same result from the theory that even the inferior or popular courts were courts "authorised by the king" within the meaning of Yag. II, 30. I have endeavoured elsewhere to show that such a reading of that verse cannot be reconciled with the interpretation placed on it by Vijnaneswara nor with the tenor of the corresponding verses in Narada, Brihaspati and Katyayana. Two other verses from Brihaspati referred to by Mr. Altekar in this connection are more significant. They deal with the punishment which *Kula*, *Sreni*, *Gana*, etc., can inflict ; but the second half of the second verse contains something like a general principle. The verses, after referring to punishments properly inflicted by *Kula*, *Sreni*, etc., say that such punishments must be accepted by the king because they must be deemed as *authorised*.

(तद्राज्ञाप्यनुमन्तव्यं निसृष्टार्था हि ते स्मृताः)

The text does not indicate whether the word 'authorised' signifies "authorised by the king" or "authorised by the Sastras." The comment upon this verse by *Apararka* and by the *Vivada Ratnakara* does not carry the matter further as they merely paraphrase *Nisrishtartha* in the verse as

अनुज्ञात कार्याः and संदिष्टकार्याः

(both in the passive form, without indicating by whom). Whether the verse was intended to cover more than is actually dealt with in the context,

it is not easy to say. But, if as I have tried to show, these inferior courts (however constituted) had been made part of a hierarchy or a gradation of courts with the king or the king's court at the apex, it is not improbable that official authority would have supported and enforced their pronouncements.

45. State's authority in relation to crimes.

The sovereign authority of the state comes even more prominently into play in the administration of criminal justice. Here, the state asserts its power (*a*) in declaring certain acts and omissions to be punishable, (*b*) in fixing the penalties for such acts or omissions and (*c*) in convicting and punishing the offender. The first two belong to the sphere of law-making or law-declaring.; the third pertains to the judicial sphere. One feature of the Smriti law presents a problem of some nicety, *viz.*, how did the Dharmasastras come to contain detailed and specific provisions as to the punishments to be inflicted for specific offences; such a process is intelligible enough in legislation but not easy to explain if the Smritis are merely to be taken to embody the customary law. Notwithstanding the existence of such provisions in the Hindu Law books from the earliest Dharma Sutras, it has often been said that the Hindu authorities did not know of a genuine system of criminal law. The criticism is not easy to justify. Speaking of fourteenth century England, Sir W. Holdsworth says "even the statutes of Edward III's reign show that the boundary line between the criminal and the civil liability was as yet uncertain. Many offences the commission of which

would in our time be repressed by a criminal prosecution were then remedied either by civil or by criminal proceedings and sometimes only by civil proceedings. There was as yet no organised police force nor were there armies of inspectors of different kinds. Except in the central courts, the administration of justice was in the hands of amateurs whose purity and impartiality were in many cases justly open to suspicion. It was necessary to enlist the injured men in the cause of law and order by holding out the prospect of obtaining heavy damages or of using the speedy process available in the action of trespass" (H. E.L. II. 453). Even today, the line between crime and civil wrong cannot be drawn with absolute definiteness : many acts partake of the nature of both. The circumstances that I have already stressed, namely, that the Hindu Law insists on the duty-aspect of the situation rather than on the right of the other party and that the role assigned by it to the king is the maintenance of the moral order as well as of the social order are of considerable significance in this connection. While not losing sight of the need for compensating the injured party, the Hindu Law books repeatedly insist that the purpose of the king should be to put the wrongdoer back in the right path, to correct and reform him, to make him penitent and purge him of the sin of his wrongful act. This is certainly not laying undue emphasis on the "civil wrong" aspect.

In his Tagore lectures on "Penology, old and new", Dr. P. K. Sen has devoted three

lectures to a discussion of "penal science in ancient India." He concludes (*a*) that the Hindu Penalists clearly apprehended the distinction between civil wrong and crime (p. 124), (*b*) that according to the Hindu Law, the predominant feature of a crime is its quality of *lokodvejakatvam* (causing alarm to people) (p. 124), (*c*) that the central idea in Hindu Criminal Jurisprudence from the very beginning was that punishment for wrong-doing was to be meted out by the king for the preservation of the social order as it was conceived in Ancient India (p. 89), (*d*) that there is no tinge anywhere of the theory of retribution or vengeance in the Hindu penal system and (*e*) that the directions given by the Hindu law-givers in the matter of punishment compare favourably with the advanced systems of today, in taking into account not only the objective circumstances of the offence but also the subjective limitations of the offender (p. 110). The last two propositions may not be as readily accepted as the other three. All kinds of cruel punishment—especially mutilation of limbs and those described as *klesa danda* (painful punishment)—whatever their value as deterrents—are in a large measure retributive and in so far as they disable the convict they cannot be regarded as reforming him. It may however be said that the English Criminal Law, even of the eighteenth century, was not much better; it was built "on an indiscriminate application of the death penalty and on purely external tests of responsibility" (Vin. His. Jur. I, p. 30). It will take me far outside the scope of these lectures to discuss Hindu Penology at any length. An interesting

account of the Hindu Criminal Law will be found in the *Danda Viveka* of *Vardhamana* (published in the Gaekwad's Oriental Series).

The conception of "breach of the king's peace" is not the only logical basis for criminal law; it is expressed in the language of a particular political order. The test as to the initiation of proceedings, namely, whether it is to be by a public officer or by the injured individual, is again not a safe or a conclusive test as to the distinction between crime and civil wrong. I have already mentioned that in respect of certain crimes the king can even under the Hindu Law take cognisance without any complaint from the victim. The insistence (on grounds of policy) on a private complaint in certain cases is not unknown even to our present law (*Cf.* sections 198 and 199 of the Criminal Procedure Code). Criminal law is to some extent based on the natural desire of mankind to avenge a wrong. If justice is to be done, the law must provide some procedure which will enable the injured person to come forward and see that justice is done. This was particularly necessary when there was as yet no organised police force of the modern type. The following comment of *Medhatithi* discussing the reasons for and against granting adjournments for an answer by the defendant is significant: "in disputes relating to debt, gift, etc., the parties may come to some settlement; the king has no right to interfere with their doing so; * * * but an offender has to be punished by the king even though the other party may like to come to some arrangement with him."

ऋणदानादिषु इतरेतरे संदधते न तत्र राज्ञो हस्तप्रक्षेपः... साहसकारी तु राज्ञा अवश्यं निगृहीतव्यः इतरेण संधीयमानोऽपि । (Dh. I, K. p. 160). The observations on pages 259 and 260 of the *Danda Viveka* deserve to be noted here. Referring to a passage in *Brihaspati* which describes the *Vivada padas* (titles of law) as *Vadikrita* (initiated by a plaintiff) and then introduces the *Prakirnakas* (certain offences and other subsidiary matters) as *Nripasraya* (depending on the king), the author says "though questions like murder are also matters to be dealt with by the king, an enquiry is in such cases made of witnesses respectively produced by the one party or the other and the king pronounces judgment against one side : in the case of *Prakirnakas* however, the king holds an enquiry even when there is no complaint by a particular party, action being taken on reports received from spies, etc., as to wrong doing by subjects and on such enquiry the king punishes them appropriately and puts them back in the right path"

"यद्यपि मनुष्यमारणादि व्यवहारा अपि नृपाश्रिता एव तथापि तेषु वादिप्रतिवादिभ्यां स्वस्वपक्षेषु दर्शितेषु विचार्य तयोरेकतरस्यापराधिनः राज्ञानुशासनम् । प्रकीर्णके तु शिरोवादिनं विनापि चरादिमुखाद्वर्णाश्रमिणां दोषं श्रुत्वा विचार्य तेषां यथाविहितं दण्डं विधाय धर्म्येपथि स्थापनमित्येवास्य तेभ्यो भेदः ।

On page 32, the author makes the same point with reference to Narada's text distinguishing murder, theft, adultery and harshness from the remaining titles of law, like debts, etc. He points out that in respect of the former, the king may take proceedings

on the report of *charas* (spies) and have the offender arrested by the officers of the state. The absence of separate Courts to deal with civil wrongs and crimes respectively or the similarity in procedure for both classes of trials is only a matter relating to the machinery and does not affect the principle. I have stated that *Kautilya* refers to two sets of tribunals, namely, the *Dharmastiya* and the *Kantaka sodhana* ; and the South Indian inscriptions of the Chola period also refer to some such division ; but the division does not exactly correspond to the basis of the modern division of Courts into civil and criminal.

It may be true to say that as long as self-help or private redress was allowed, the distinction between crime and tort was hardly material. But even the *Sutras* do not suggest that private vengeance was permitted during their time. The authors of the Vedic Index have suggested—and it may be true—that during the Vedic period, the practice of *Vaira Yatana* (corresponding to payment of wergild) prevailed. Even this would only show that by that time private vengeance had ceased to be the rule. It may be interesting to refer in this connection to a difference between the *Sutras* of *Apastamba* and of *Baudhayana*. The former provides for the giving of cows by a murderer by way of *Vaira Yatana* (S.B.E. II, pp. 78-79) ; but the text does not say *to whom* the cows are to be given. On the theory that *Vaira Yatana* implied expiation of the *sin*, the gift was understood by some to be made to brahmins ; but, on the footing that *Vaira Yatana* meant the "removal of enmity," either of the dead man (even after his death) or of his relatives,

the gift was understood by others to be made to the relatives of the deceased. The *Baudhayana Sutras* make it clear that the cows were to be given *to the king* (S.B.E. XIV, p. 201) and one bull was to be given presumably to brahmins in expiation of the sin. The idea that the punishment of the offender was intended to act as a deterrent on the minds of other people is indicated in Manu, VIII, 334, in which the word *Pratyadesaya* is interpreted by the *Manvartha vivriti* to mean " to prevent others."

(अन्यस्यापि निषेधाय)

46. Penance and expiation.

The association of penances with punishment for crime—whatever else may be said against it—is itself a recognition of the distinction between the reparation or compensation aspect and the punishment or reformation aspect. It definitely introduced the concept of individual moral responsibility. As late as Katyayana (472) *prayaschitta* (expiation) and *danda* (punishment) are spoken of as the twin modes of purification of the wrong-doer. According to the Svadharma theory (which I have endeavoured to explain at some length), a crime, being a deviation from the offender's dharma, involved not merely harm to society but also degradation or loss of caste to the offender and thus made him (1) unworthy of social communion and (2) unfit to perform spiritual acts. Hence arose the necessity for expiation. Penance, expiation and post-mortuary punishment were logical parts of a system based on the religious and philosophical theories accepted and sincerely believed in by the ancient

Hindus. Hioun-Thsang records "they dread the retribution of another state of existence." (Beal II, p. 83). The position may be compared with what prevailed in Europe during the Middle Ages. "The Church required penance for homicide, wounding, way-laying, treason against the lord, perjury, incest : for some offences, penance formed the only penalty ; in other cases it was reinforced by secular punishments. Those who refused to undergo penance were liable to be sentenced by the secular authority to fine or imprisonment or to be outlawed * * * it suited both state and church in those days to identify crime with sin and hold that the secular law had a religious purpose as well as a punitive function" (Rob., pp. 78, 79 and 93 ; see also Herbert Spencer, Political Institutions, 615-617) The theory of expiation achieved the very purpose which modern penology emphasises as the proper aim of punishment, because the necessary conditions precedent to a *prayaschitta* (expiation) are *Anutapa* (contrition) and *Uparama* (resolve not to commit the wrongful act again). I have already explained how the political theory of the Hindu state involved the enforcement by the king of both temporal and spiritual penalties—the one as much as the other had been prescribed by a law which was binding on the king himself. That the offender was expected to surrender himself voluntarily for punishment (Gautama S. B. E. II, p. 244 ; Apastamba S.B.E. II, pp. 82 and 90)—though the idea was based on fear of punishment in the after-life—only emphasises the recognition of the principle of responsibility.

47. Privileges and Immunities of the Brahmin.

The special treatment of the Brahmin by the Hindu Criminal Law has provoked strong criticism. Maine thought fit to say that the Brahmins claimed ' to be free of the criminal law which they themselves prescribe ', (E.L., p. 47). Even Indian writers like Mr. Jayaswal have condemned the Manu Smriti for "placing the Brahmin above the law." Mr. Jayaswal says, (*i*) the earlier law was inclined to be harsher to the Brahmin, (*ii*) unlike Manu, Yagnavalkya set aside the extravagant claims of Brahmins for total immunity and brought them under the king's law and (*iii*) at the time of the *Mrichchakatika*—which he places sometime before the rise of the Gupta power, when Buddhism was flourishing and in favour —the Brahmin was not exempt from capital punishment. As a matter of history, these statements seem to me open to question and it is only right that the matter must be viewed in its proper historical perspective. The apparent partiality of the law to this community will cease to loom so large if it is remembered that the Hindu Criminal Law prescribed two kinds of punishments, secular and spiritual, that in the case of the Brahmin, the spiritual penalty, though administered by Brahminical authority, was more severe than in the case of the other castes and that according to the prevalent ideas of the time, the fear of such punishment was even greater than the fear of secular punishment. For a correct understanding and appreciation of the position, three questions must be kept distinct : (*a*) the general rules regulating punishment, (*b*) the question of *Vadha Danda* (which

includes both capital punishment and mutilation) and (*c*) the claim of the Brahmin to immunity from the jurisdiction of the kshatriya king.

As to (*a*), the Hindu Law—much in advance of other systems —has laid down as early as Gautama (S.B.E. II, p. 240) that if a learned man or one of the higher caste offended, he should be liable to more severe punishment. This was not founded on any principle of caste discrimination. The Bhashya on Gautama gives the reason as follows : "The offence is greater when it is committed by a man who knows that the act has been prohibited."

निषेधदोषं ज्ञात्वापि प्रवर्त मानस्य दोषाधिक्यं भवति ॥

That Manu has not ignored this principle even in respect of the Brahmin will be seen from Manu, VIII. 337—338 (*Cf.* Kat. 485.) If the Hindu Law prescribed a severer penalty when a man belonging to a higher caste was the victim of an offence committed by a member of a lower caste, this was nothing peculiar to the Brahmin ; indeed, such a provision was a common feature of all early systems of law, not to speak of the practice still obtaining in the white countries when the alleged victim belongs to a white race and the suspected offender to a coloured race.

As to (*b*)—namely, immunity of the Brahmin from capital punishment, etc.—whether it was justifiable or not, I am unable to find any difference in this respect between one stage of the Hindu Law and another. The notion of the sanctity of the Brahmin's life and body seems to have come down from the Vedic Period, from a time when Brahmins were apparently leading a truly religious life.

Commenting on the Sutra of Gautama which provides for the immunity of the Brahmin from six kinds of punishment, the Gautama Mitakshara suggests that the offences contemplated in the Sutra must have been "involuntarily" committed, because there was no likelihood of a learned Brahmin "voluntarily" committing offences.

बुद्धिपूर्वस्य प्रसंगाभावात् ।

Whatever might have been the origin of the rule, the exemption was not one introduced by Manu nor one that came into vogue in what has been called the period of Brahminical reaction. Both Gautama and Baudhayana exclude *Sareera Danda* (Corporal punishment) in the case of the Brahmin. The Baudhayana Sutra says "of course, the Brahmin cannot be punished in his body for any offence."

अवध्यो वै ब्राह्मणस्सर्वापराधेषु

The commentator says that the particle *vai* (meaning *of course* in the Sutra) which generally signifies that what is enunciated is well-known, recalls the Vedic origin of the exemption.

It is noteworthy that even the Arthasastra recognises the exemption. The concluding portion of Book IV, Ch. VIII, says "whatever may be the nature of the crime, no Brahmin offender shall be subjected to physical pain" (*Apeedaniya*). Mr. Shama Sastri translates *Apeedaniya* in this passage as "shall not be tortured"; and some writers seem accordingly to take it that this prohibition relates to what is to happen *before* conviction and not to punishment on conviction. That this is not the correct view is shown by the next sentence,

which says "the face of the Brahmin shall be branded so as to leave a mark indicating his crime : the sign of a dog for theft, that of a headless body for murder, that of the female part for rape on the teacher's wife and that of the flag of vintners for drinking liquor. After having thus branded and proclaimed his crime in public, the king shall either banish a Brahmin offender or send him to the mines for life." This passage makes it clear that the context relates to the manner in which a Brahmin found guilty of a crime should be dealt with. Subject to small differences, this is just the kind of punishment prescribed for the Brahmin, both by the earlier Sutras and by the later Smritis, when he is found guilty of any grave crime. The Arthasastra makes a special provision in respect of a Brahmin who is guilty of aiming at the kingdom or creating disaffection in the army or forcing entrance into the king's harem. In these cases it is said that he shall be drowned.

(तमप: प्रवेशयेत्)

(Mr. Shama Sastri gives a variant reading.

(तम: प्रवेशयेत्) ;

but it is difficult to make out the meaning of this reading.)

That Manu has not departed from the pre-existing law will be seen by a comparison of the above provisions of the Arthasastra with the corresponding rule in Baudhayana and with Manu VIII, 379 and 380 (as to 380 there is some difference of opinion among the commentators as to its interpretation) ; see also Manu IX, 235—241. Far from departing from

this principle or from Manu, Yagnavalkya seems to have adopted the same principle in II, 270. (for a discussion of the earlier texts, see the Mitakshara commentary on Yag. II. 4). That Narada and Katyayana followed the early rules will be seen from Narada 21, 41—43 (S.B.E. XXXIII, p. 229) and Kat. 483, 967 and 968.

Such having been the provisions of the Dharma Sastras all along, it is difficult to concur in Mr. Jayaswal's statement that at the time of the *Mrichchakatika*, the law did not exempt the Brahmin from capital punishment. The story of the death sentence in that drama has been adverted to by Mr. Kane (History of the Dharma Sastras II, pp. 139, 139, etc.) I am inclined to think that the author of the play has introduced the story of the death sentence only for dramatic effect. It is noteworthy that when the Gourt makes its report to the king, it reminds him that according to the laws of Manu, the Brahmin cannot be subjected to *Vadha Danda* but can only be sent out of the country.

(अयं हि पातकी विप्रः न वध्यो मनुरब्रवीत् ।
राष्ट्रा दस्मात्तु निर्वास्यः विभवैरहतैस्सह ॥

The king nevertheless directs his execution because (as the Gourt messenger reports) it will serve as a deterrent to any person who may be tempted to commit a similar crime. The last verse of the Ninth Act contains the curse of the accused Gharudatta on the king who directs the execution of a Brahmin on the strength of his enemy's testimony instead of subjecting him to any of the well-known ordeals. As if the curse comes true, the king is

shortly thereafter deposed. The climax is reached when Vasantasena, the alleged victim of the murder, herself appears on the scene and the contrast between the nobility of Charudatta and the cowardly meanness of the accuser (the king's brother-in-law) is emphasised by making the latter cringe before Charudatta himself who, now free and once again in royal favour (with the new king), pleads for mercy even to his vile enemy. These developments in the plot were facilitated by the story of the imposition of the death penalty on Charudatta.

As to the prevalent practice in India itself, it has been recorded by the Chinese traveller Sung Yun (who visited India in 518 A.D.) that the murderer was not allowed to be killed. "They only banished him to the desert mountains affording him just food enough to keep him alive" (Beal's Buddhist Records, Popular Edition, introduction p. xciv). Earlier (about 400 A.D.), Fahian had noted that "the kings govern without corporal punishment: criminals are fined according to circumstances lightly or heavily. Even in cases of reputed rebellion, they only cut off the right hand" (*Ibid.*, p. xxxvii). In 640 A.D., Hioun Thsang recorded "when the laws are broken or the power of the ruler violated, the matter is clearly sifted and the offenders imprisoned. There is no infliction of corporal punishment: they are simply left to live or die and are not counted among men". "When the rules of propriety or justice are violated or when a man fails in fidelity or filial piety they cut his nose or his ears off or his hands and feet or expel him from the country or drive

him out into the desert wilds. For other faults a small payment of money will redeem the punishment." (*Ibid.*, Vol. I, pp. 83, 84). I may add that in many systems (including the Roman) banishment or even voluntary exile was regarded as a convenient substitute for the capital sentence. In Rome, it is stated, the death penalty was generally not carried out against a citizen; the condemned man was permitted to go into exile (Str. Dav. II, p. 24). Students of English legal history may be reminded that much the same result followed in English Law from what is known as "Sanctuary and Abjuration," not to speak of the doctrine of the "benefit of the clergy" (H.E.L. III, pp. 293-305).

Proceeding next to (*c*) the third of the points above stated—the claim of the Brahmin to immunity from the jurisdiction exercised by the Kshatriya kings—here again, the matter goes back to Vedic times. It is natural that during the period of the wars connected with the Aryan occupation of India, the power of the king and his fighting men must have grown: hence arose the tension between the Brahmins and the Kshatriyas. The authors of the Vedic index observe "the (Vedic) texts regularly claim for them (Brahmins) a superiority to the Kshatriya. It is to be admitted that the king or the nobles might at times oppress the Brahmins, but it is indicated that ruin is then certain to follow. The Brahmin claimed to be exempt from the ordinary exercise of the royal power. The king censures all but not the Brahmins." (V.I. II, p. 81).

Some verses of Katyayana (4 to 7 and 15), written many centuries later than the Vedas, tell

the same tale. Wealth and power, they say, might lead the king to oppress the Brahmin. This accounts for the struggle of the Brahmins against the king's power and jurisdiction. The claim to immunity was made as early as the Vedic times. It seems to have been realised even then that harmony and co-operation between the two sections of the community were necessary as much in their interests as in the interests of the country. When this had been secured, the claim to immunity from the king's jurisdiction was no longer insisted on. The Manu Smriti does not seem to be responsible either for the claim or for its withdrawal. The Gautama Smriti (continuing the old claim) said "the king is lord over all except the Brahmins"

(राजा सर्वस्येष्टे ब्राह्मणवर्जं)

According to Apastamba, when a Brahmin was complained against, the matter must be referred to the purohit of the king. The Mauryan monarchy was powerful but it also sought and obtained the co-operation of the Brahmin, as the story relating to Chanakya himself shows; and we no longer hear of the claim for exemption from royal jurisdiction in any of the later Dharma Sastras. If the Manu Smriti accepted or, as some would say, invented the theory of the divine origin of kingship, the king on his part had given up the claim to be above the law by reason of his power.

The early struggle between the two communities was but the analogue of (*i*) the struggle of the barons in England against the jurisdiction of the king's court, which ended in the establishment of the principle of "trial by peers" and (*ii*) of the

struggle of the clergy in Mediæval Europe for immunity from the jurisdiction of the temporal courts. Describing the opposition of the clergy in England to the union of the civil and Ecclesiastical Courts during the reign of Henry the First. Stephen says: "the popish clergy, under the guidance of that arrogant prelate Archbishop Anselm, disapproved of a measure that put them on a level with the profane laity and subjected spiritual men and causes to the inspection of the secular magistrates" (Commentaries, Bk.V, Ch. V). Of the Roman Law, it has been said that on its criminal side it never acquired the clearness and precision which characterised its civil application. This was in some measure due to the large influence which political conditions exercised on the definition and punishment of crime. (*See* Article on Crimes and Punishments, in Hastings' Encyclopaedia of Religion and Ethics, Vol. IV.) If, in the circumstances of Rome, political conditions were responsible for such a state of things, it is nothing strange if in the conditions prevailing in Ancient India, religious influences brought about a like result.

48. Police Organisation.

To the police organisation of the time, there is in the Dharma Sastras little more than a stray reference here and there. As the Smritis imposed an obligation on the ruler, from the earliest times, to compensate victims of theft, if the thief was not traced and the property recovered and as the ruler was expected to take cognizance of certain crimes even without a complaint, some organisation to

enable him to discharge these duties properly must have been in existence. A text of Apastamba (already referred to) requires the ruler to appoint pure and truthful men of the three castes over villages and towns for the protection of the people. It also requires towns to be protected from thieves (S.B.E. II, 163). For purposes of external and internal protection, the Arthasastra advises the erection of fortresses in groups of villages and of forts in the extremities of the kingdom to guard the entrances to the kingdom. It then provides "the interior of the kingdom shall be watched by trap keepers, archers, hunters, chandalas and wild tribes" (Bk. II, Ch. I). At the end of Ch. VI of Bk. IV, it says "a commissioner with his retinue of *Gopas* and *Sthanikas* shall take steps to find out external thieves and the officer in charge of a city shall try to detect internal thieves inside fortified towns." Bk. IV, Ch. XIII, refers to various officials who are to investigate and be responsible for thefts in the villages, on pastures and on the roads. (They are respectively referred to as Gramaswami, Viveetadhyaksha and Ghorarajjuka.) The same passage throws responsibility on the people of the villages, where such officers have not been appointed. A text of Brihaspati, dealing with the enforcement of agreements entered into between villagers or other groups, contemplates agreements providing for protection against theft (Dh. K. II, p. 872). The verse expressly mentions danger from *Chata* (wild animals) and *Chora* (thieves); as an illustration of such agreement the *Smriti-chandrika* gives the following: "In the event of theft scare, an agreement that each household

should send one clever armed man."

(चोरोपद्रवे प्रतिग्रहमेकैको दक्षः शस्त्रपाणिरागन्तव्य इति)

Manu VII. 114 & 115, refer to headmen of villages and groups of villages and IX. 272 refers expressly to persons employed for protecting the kingdom.

(राष्ट्रेषुरक्षाधिकृतान्)

In Ch. II. 266, etc., Yagnavalkya refers to thieves and other suspected offenders being caught by *Grahakas*. The Mitakshara explains *Grahakas*, as referring to *Raja Purusha*, *Sthana pala*, etc. Yag. II. 271 & 272, mention the liability of the very persons named in the Arthasastra to compensate the victim if the theft is not detected. While commenting on these verses, the Mitakshara refers to similar texts of Narada (*see also* Kat. 813 & 814 and the footnotes thereto). Besides detection of theft, several of the other matters referred to in the *Kantaka Sodhana* section (Bk. IV) of the Arthasastra must have required a staff of officers. There are numerous references in the books to *Charas* (spies) who seem to correspond to the intelligence department of a modern police organisation (*see* for instance Chapters IV, V & VI of the Arthasastra ; *see also* Manu IX. 256-272). Some of the provisions in the *Kantaka Sodhana* section resemble the security sections of the Indian Criminal Procedure Code, though the procedure contemplated is not the same. Chapter VII of Bk. IV of the Arthasastra relating to the investigation of cases of sudden death is noteworthy and the hints therein given as to the kind of enquiry to be made are instructive (*see also* Yag. II. 280 & 281).

49. Do the Dharma Sastras portray a system actually in operation.

It will now be convenient to turn to the two remaining questions indicated in the opening lecture, namely, (*i*) whether the judicial system described in the Hindu Law books was only an ideal or imaginary system or represented a system of administration actually in vogue and (*ii*) what light do such historical materials as are available to us throw on the methods of judicial administration that obtained in this country during what may be called the ancient and the early mediaeval periods of Indian History and in the Hindu States.

No unbiassed student of the Smriti literature can assert that the system whose beginning and developments are traceable from stage to stage was wholly imaginary or ideal. The rules laid down are so detailed and practical and their development is so natural that they must have been the result of actual experience in the daily administration of justice.* Speaking of the variety of tribunals mentioned in the Smritis, Dr. Mookerjee rightly observes "the existence of these various terms is in itself strong evidence demonstrating the reality of the institutions designated" (L. G. p. 35). The Dharmasastra works as well as the commentaries and the Nibandha Granthas have been produced from different parts of the country and some of the commentaries and Nibandhas were produced under royal patronage or by authors who were themselves associated with public administration as Ministers or Judges. Apastamba was (according to Jolly) of the Andhra country : Baudhayana of South India : Narada

of Nepal: Medhatithi of Kashmir: Aparарka belonged to the Konkan: Hara Datta to South India and Nanda Pandita to Benares. The author of the Subodhini belonged to North India. Vijnaneswara produced the Mitakshara under the patronage of the Chalukya rulers; Hemadri was a minister of the Yadavas of Devagiri; Lakshmidhara was a minister of Kanauj; Chandeswara was a minister and judge under one of the Mithila rulers; Madhava was a minister of Vijayanagar; and Vachaspati Misra was a Court pandit under one of the later Mithila rulers. The author of Nrisimha Prasada was a Viceroy (at Devagiri) under one of the Ahmednagar rulers and the author of the Saraswati Vilasa was a ruler of Orissa. Why should they all have indulged in the pastime of writing about a system of judicial administration which never existed? The *Jaya Patras* of Darbhanga and Java referred to by Mr. Jayaswal and Prof. Jolly afford proof that the directions contained in the Smritis as to the forms of judgments were in fact being followed. Prof. Jolly rightly adds that law and procedure in places like Burma and Java and the practice prevailing all over the country in the matter of the drafting of documents and royal grants show that the Smritis represented existing practice.

50. Historical evidence.

Turning now to the testimony of history, it must be admitted with regret that historical materials are very scanty. Such as have been made available by the labours of the Archaeological Department (inscriptions, grants, etc.) have been

studied and their results summarized partly in the reports of the department and partly in the writings of research workers to some of which I shall presently refer. Some information is also available in our literature and some information may be gleaned from the accounts given of conditions prevailing in this country by travellers who visited it from time to time. There is however room for doubt as to the propriety of basing any conclusions on the scanty information available under the last head. A pilgrim or a traveller will be more interested in observing the ways of the people, thier religion, manners and social life ; he is scarcely likely to be attracted to a study of prosaic topics like the administration of justice.

(*i*) *Ancient India—Greek and Latin writers :*— The information available from the works of the early Greek and Latin writers has been collected and analysed by Mr. Monahan (L.B. Chs. XII to XV; *see also* Chs. I & II). Referring to the accounts given by the early Greek visitors, he says " none of these accounts has survived in its original form. What we have are descriptions of India by Greek and Latin authors who wrote centuries later and who never visited India themselves but probably derived most of their information directly or indirectly from the earlier accounts of the Greek writers and those of Alexander's companions" (p. 140). He felt constrained to say "Megasthenes' account is obviously superficial and inaccurate" (p. 31). On p. 167, Mr. Monahan cites a remark of Strabo made on the authority of Megasthenes that " the Indians had no written laws, being ignorant of writing,

and conducted all matters by memory". Dr. Buhler had to explain away this passage as based on a misapprehension of the meaning of the word *Smriti* which also means "memory" (*see also* Camb. H.I. I, pp. 191, 413 & 483). Another early writer is quoted by Mr. Monahan as stating that "among the Indians, one who is unable to recover a loan or a deposit has no remedy at law. All the creditor can do is to blame himself for trusting a rogue". For further remarks on the Greek and Latin sources *see* Camb. H.I. I, Ch. XVI. Referring to the account given by Megasthenes, Mr. Jayaswal thinks that it confirms the view that the laws of Kautilya were the laws actually in vogue about 300 B.C. (M. & Y. p. 304). Mr. Vincent Smith observes, "the general honesty of the people and the efficient administration of the criminal law are both attested by Megasthenes. When crime did occur, it was repressed with terrible severity. The criminal code as a whole was characterised by an uncompromising sternness and slight regard for human life". Mr. Monahan however thinks that though the cruel punishments known to the early law were re-stated in the Arthasastra, it is probable that many of them had ceased to be inflicted by that time or were allowed to be commuted into fine.

(*ii*) *The Buddhist Pilgrims:* Fahian visited India at the beginning of the fifth century A.D. According to him, the administration of criminal law in India was mild in comparison with the Chinese system. Most crimes were punished only by fines varying in amount according to the gravity of the offence; capital punishment would seem

to have been unknown. Persons guilty of repeated rebellion or brigandage suffered amputation of the right hand but such a penalty was exceptional ; and judicial torture was not practised. Hioun Thsang's visit was paid in the second quarter of the seventh century A.D. I have already quoted some extracts from his account. According to him, violent crime was rare but the roads and routes were evidently less safe than in Fahian's time. Imprisonment was now the ordinary penalty but the prisoners were left to live or die. Other punishments were mutilation of the nose, ears, hands or feet, these being inflicted as the penalty for serious offences and for failure in filial piety. This penalty was sometimes commuted into banishment. Minor offences were visited with fines. Ordeals by water, fire, weighment or poison were regarded as efficient instruments for the ascertainment of truth (Smith, Early History of India, p. 315).

(*iii*) *Evidence from literature :* Of the evidence available from literature, the information furnished by the Mrichchakatika is the most valuable. Seeing that the author lived in the best days of Hindu rule, I see no justification for thinking that the account given in the Ninth Act of that Drama of a trial in Court did not correspond to the realities of the time. The reference which Charudatta, on his appearance, makes to the dignity of the Court and to the look of anxious care in the faces of the judges is very realistic. The judges in turn give expression to their sense of responsibility and the difficulty of getting at the truth when a matter comes before a Court of law.

यथा यथेदं निपुणंविचार्यते तथा तथासंकटमेव दृश्यते ।

अहो सुसन्ना व्यवहार जातयः मतिस्तु गौः पङ्कगतेवसीदति ॥

Conformably to the principle enunciated in the Smritis, the judges declare that their duty is only to give a finding and that everything else rests with the ruler.

निर्णयेवयं प्रमाणम् शेषे तु राजा ॥

The Court-keeper's acts as described in the drama substantially represent what any one will find even today if one enters a Court of law sometime before the Court commences its work for the day. In due course, the judge (appinted by the king) enters, accompanied by the *Sreshti*, the *Kayastha*, the *Niyuktas* (chosen brahmins), etc., and the judge asks the court-keeper "who are all waiting for justice". The complainant makes his complaint; and, putting some questions to him, the judge asks the *Kayastha* to record the complainant's statement as it proceeds. The persons against whom complaint is made are sent for through the Court-keeper and it is significant that when sending for Charudatta, the judge says "summon him courteously."

(सादरमाहूय)

The persons thus summoned are put at their ease and persuaded to answer questions without reserve "in the interests of *Vyavahara*". The complainant objected to his enemy Charudatta being given a seat and he accordingly sat down on the floor. The judge describes *vyavahara* as comprising two stages, the former (वाक्यानु सार) being the examination of the paties and the latter

(अर्थानु सार) being the consideration by the judge. When the king passes a sentence of death on Charudatta (notwithstanding the advice of the court that as a brahmin he should not be subjected to that penalty) the prisoner is handed over to the executioners who are referred to as *Chandalas.* It is stated that it was the practice to proclaim in a number of public places the offence of the accused as well as the sentence imposed upon him, so that it may act as a deterrent on other members of the public. The conversation between the executioners is very natural and few can fail to appreciate the wisdom of the advice which one of them says he received from his father, namely, "never to be in a hurry to carry out a sentence of death, because if there is some delay something may happen in the meanwhile and the convicted person may after all be set at liberty".

Kalidasa frequently affirms, especially in the Raghuvamsa, the political theories and ideals found stated or recommended in the Dharmasastras and in the Epics, especially in respect of a king's duties to his subjects. In the *Sakuntalam* (Act VI), we get a glimpse of what was expected of a king in the administration of the affairs of the state. When one day the king could not attend in person, he thought it proper to plead inability on account of sleeplessness and he asked the minister to send up to him the record of what had been done by the minister. We also get a glimpse of the police administration of the time. When the fisherman (who found the king's signet ring in a fish which had swallowed it and later got caught in his net) unwittingly took the signet ring into the

city and offered it for sale, he was arrested by two spies, and a *Syala* and interrogated as to how he came by it. The definition of *Syala* in the Amarakosa shows that he represented a well-known class of guardsmen, though of low caste. The two men who arrested the fisherman are addressed by the *Syala* as *Suchaka* (spy) thus indicating their part in the detection and report of crime.

In the Rajatarangini (a chronicle of Kashmir written in the 12th century), the author refers to two or three instances of justice being administered by the kings. Sir A. Stein considers that the author's description may be taken to be a reliable account of what he saw in his time. In the fourth book, the poet refers to an instance in the time of Chandrapida who is regarded as having "shown the way of justice and removed foolish practices from the legal course" (verse 53). A brahmin woman complained before him that her husband had been murdered by a sorcerer and she threatened to starve to death unless the offender was punished. She indicated her suspicion against another brahmin. The king had the suspected brahmin brought into his presence and ordered him to exculpate himself. When the widow suggested that the accused, because of his knowledge of magic, would manage to go through ordeals with ease, the king turned round and asked "what shall we judges do to a man whose guilt has not been shown" (verse 95). The next verse refers to the exemption of brahmins from capital punishment. As the brahmin woman threatened to persist in her starvation, the king spent three nights before his deity and in a dream he was told

by the deity "search after truth is not proper in the Kali Age. Who could place the Sun on the sky at night" (verse 101). As a special mark of grace, however, the deity advised the king to throw rice flour in the courtyard of the temple and added that if during the circumambulation of the temple by the suspected brahmin there are seen behind his foot-prints the foot-prints of Brahmahatya, he must be taken to be the murderer and appropriately punished. He was accordingly found guilty and punished, but not with death as he was a brahmin. This evidences the prevalent faith of the age in divine guidance and judgment. In the sixth book, the author describes what took place when a civil dispute was brought on appeal before King Yasaskara highly praised for his just and wise rule. A citizen complained to him that when he sold his property he had excluded a well with steps from the sale so that it might be a source of income to his wife. But he found that his vendee had taken possession of the well, claiming it to be included in the sale-deed. The sale deed when produced purported to include it (the words used were सोपानकूप सहित) and the judges had accordingly dismissed his claim after due consideration. As the complainant persisted that he had been wronged and threatened to starve to death, the king assembled all the judges and enquired into the case. The Judges repeated that their decision was right and that the complaint was fraudulent. "An inner voice of the king as it were declared that the claimant was in the right" (verse 31). The king cleverly took from the defendant the defendant's signet ring and retiring with it into his room sent a messenger with that ring

to the defendant's house and asked him to bring the defendant's account book saying that the defendant wanted it and creating confidence by showing the signet ring. The account book showed that a large amount of money had been paid to the Official Recorder (Adhikarana Lekhaka), an amount much higher than would have been ordinarily payable. The king suspected that this must have been paid to him to make him a party to entering falsely in the sale-deed that the well also was included. (In Sanskrit it required a change of only one letter, *viz.*, Sahitam instead of Rahitam, to bring about this difference.) The Official Recorder was accordingly summoned and examined " Under the promise of impunity (verse 40) the truth was thus found out and the Councillors convinced." Another instance recorded in the same book is the decision of a dispute between a man whose money-purse had fallen into a well and a stranger who took it out, as to the remuneration payable to the latter (verses 45-66). This story only emphasises the distinction between the letter and the spirit of a promise. These accounts very much resemble the stories that one has heard of the ways of Caliph Haroun-al-Raschid in the attempt to get at the truth. The kings were not prepared to limit themselves by any definite rules of procedure. Speaking of Akbar and Abul Fazl, Mr.Smith states " Akbar and Abul Fazl made small account of witnesses and oaths. The governor of a province was instructed that in judicial investigation he should not be satisfied with witnesses and oaths but pursue them by manifold enquiries, studying of physiognomy and the exercise of fore-

thought." Mr. Wahed Hussain has taken strong exception to this statement (Administration of Justice during the Muslim Rule in India, p. 36); I am not however concerned with what happened under the Muslim administration. The above passages from the Rajatarangini show that the Hindu mind did not consider such methods of arriving at the truth improper. The reference in the Rajatarangini to the *Adhikarana Lekhaka* is of some significance as confirming what other indications in the Smritis and the evidence point to, *viz.*, the existence of an official in whose presence the sale of a piece of land is concluded and who after measuring the land drew up the deed (*see* footnote in Stein's Rajatarangini, Vol. I, p. 238).

(*iv*) *South India.*—We may now turn to the information available about judicial administration in South India, both before and after Hioun Thsang's visit. It is not easy to say when exactly Aryan influence began to make itself felt in South India. Whenever it was, it was obviously the result of peaceful penetration mainly by the intellectual classes. The Tamils had already developed an advanced civilisation of their own. Intercourse between Hindusthan and the South had probably begun even before the establishment of the Mauryan Empire. Dr. Bhandarkar would place the Aryan penetration into the Deccan in the Seventh Century B.C. South India was known to the Sanskrit writers of the North by the commencement of the Christian era. Early in the Second Century A.D. Jainism seems to have taken deep root in South India. According to Mr. Smith, when the emigrants from the north who had settled at Madura and other

cities of the south sought to introduce Hindu notions of caste and ceremonial, they met with much opposition. There however seems to be little difference between the ideals set before the king in the *Tolkapiyam* and in the *Kural* and those prescribed in the Sanskrit works. The *Silappadhikaram* (an early Tamil work) refers to brahmins present in the Courts of Justice (Arakkalathu Andanar). In the early days of Pallava rule, Buddhism and Jainism seem to have been living forces in the Deccan and in South India, but by the time of Hioun Thsang's visit, the predominant position was occupied by the growing Hindu educational institutions, particularly those spreading Sanskrit learning. The later Pallava monarchs seem to have been great patrons of Sanskrit. The earlier Pallava inscriptions and grants are in *Prakrit* but the later Pallava grants are in Sanskrit. In some of these grants, it is claimed with pride (when describing the grantor) that the king had preserved and protected *Varnasrama Dharma*, showing that this was considered his high duty (Dr. Meenakshi's Pallava Administration, p. 159). When Hioun Thsang visited Conjeevaram (Kanchi) in 640 A.D., the Pallavas were in the height of their power.

The celebrated Uttiramerur inscriptions afford useful information as to the social life and administrative system of that part of South India during the Tenth Century A.D. They show that the whole administration of the village was in the charge of a *Maha Sabha* which created subordinate bodies to be in charge of various kinds of work. The assembly exercised large powers even in the administration of criminal justice, functioning through a

committee of justice. When heinous offences were alleged, they decided as to the guilt and the king awarded the punishment (this tallies with what is stated in the Smritis). The assembly also discharged police functions. The whole administration was practically carried on by the people, subject in the last resort to control by Divisional Governments and by the Government at Headquarters; but there was no undue interference by royal authority (*see* Dr. Krishnaswami Aiyangar's Hindu Administrative Institutions in South India). Dr. Meenakshi states that there were two kinds of courts, the *Dharmasana* and the *Adhikarana* and she thinks that they must have corresponded to the *Dharmastiya* and the *Kantaka Sodhana* of the Arthasastra. Differing from Dr. Krishnaswami Aiyangar, she holds that the *Dharmasana* was probably a Court established in the rural areas by the Central Government and not a committee of the village assembly (as assumed by Dr. Krishnaswami Aiyangar). She is of the opinion that the king controlled the Courts in the villages as well as in the districts.

Mr. Neelakanta Sastriar (in his books, 1. The Cholas and 2. Studies in Chola History) has stressed the danger of generalising from the Uttiramerur inscriptions. Both he and Dr. Altekar (V.G.W. I) have rightly sounded a note of caution against the common tendency to assume that what existed at one time or in one part of the country must very likely have also existed at another time or in another part of the country. Mr. Sastriar has pointed out that the village assembly of later historical times in the south was the product of the inter-action of southern and northern (Tamil and

Sanskrit) influences. The Sabha (according to him) was the assembly of brahmin villages. The *Ur* represented the primitive local organisation indigenous to the Tamil country and the Sabha was generally a super-imposition. " The continued existence of the more ancient *Ur* by the side of the new Sabha seems to have been secured as part of the new order in adjusting the relation between the old and the new settlements." Revenue officials seem to have exercised some magisterial powers. Adjudications often took place without reference to the officers of the crown and matters went up to them only in the last resort, when other means had failed. Many disputes were settled by one or other of the local corporations to which the disputants belonged. The village assembly or its committee dealt with such matters as did not fall within the jurisdiction of the occupational groups of the locality. During the Chola regime also, the self-governing village was the unit of administration. A number of villages constituted a *Nadu*, *Kottam* or *Kurram*. A big-sized village (often a Kurram by itself) was called *Thaniyur*. Justice was largely a matter of local concern. The inscriptions show that the village assembly acted not only as the authority responsible for the punishment of local offences but also as the custodian of the general conduct of the villagers and the controller of their morals. Under the Cholas, the village assemblies seem to have been brought under closer supervision by the Central Government. The Dharmasana referred to in the inscriptions was, according to Mr. Sastriar also, probably the king's Court of justice, the attending brahmins being called Dharmasana Bhattars.

Of the nature of judicial records or the details of judicial procedure, we learn very little from the inscriptions. Mr. Sastriar however refers to the story of an imaginary trial in a Tamil literary work (of Sekkilar) of the early twelfth century (the time of Kulothunga II.) This may help to give some idea of the procedure of Courts at that time. According to this version, the plaintiff stated his case before the Court and the judges after considering some preliminary questions, called on the defendant to plead. During the trial, three kinds of evidence were regarded as useful, namely, usage, written evidence and oral evidence. When the genuineness of any document which was produced was impeached, the matter was decided by a comparison with other admitted documents produced from the records of the village. This account indicates a well-defined procedure, whether the same had been borrowed from the Sanskrit authorities or not. Turning to criminal administration, Mr. Sastriar says that all offences were tried in the first instance in the village Courts. In case of dissatisfaction, the matter was taken up to the officer of the king's Government in charge of the administration of the *Nadu*. Seldom, if at all, did an appeal go further. There was a great deal of rough natural justice dispensed through extra-judicial machinery. An effort was made to satisfy both parties that the standard of justice which would satisfy reasonable men had been attained in the award. The moral support of public approval was the primary sanction underlying the daily activity of the village assemblies and voluntary associations. In the last resort, they could both

appeal to the king's government for support. Offences against the person of a king or his close relations were a class apart; they were dealt with by the king himself.

Before proceeding to the evidence relating to the system of administration prevailing in the Vijayanagar empire, I may make a passing reference to what Alberuni is said to have stated, describing Indian judicial administration early in the eleventh century A.D. According to him, written plaints were generally filed in which the case against the defendant or accused was stated. Oral complaints were also received. Oaths were administered and cases decided according to the depositions of witnesses. Equality of men in the eye of the law was not known. The Brahmin was exempt from capital punishment; his punishment was expiation, consisting of fasting, prayer and gifts. Theft was punished according to the value of the property stolen and in certain cases mutilation of the limb was permitted.

(*v*) *Vijayanagar Empire.*—The Muslim conquest of Hindustan led to the migration of brahmin scholars to the south. The process of Aryanisation of the Dravidian races and the spread of Aryan culture in the Deccan and in South India must have received a fresh impetus therefrom. Mr. Mahalingam has made a special study of administration and social life under the Vijayanagar Empire and his book (Administration and Social life under Vijayanagar) contains a chapter on law, justice and police. Seeing that the author of the *Parasara Madhaviya* was associated with the administration of Vijayanagar and one of the rulers of that kingdom

(Krishnadeva Raya) was the author of a work (*Amuktamalya*) which re-affirms many of the political theories and doctrines of the Dharmasastras, one would have expected that the administration of justice in the Vijayanagar Kingdom would have followed the Dharmasastra pattern. Indeed, this is the view put forward by Mr. Ramayya Pantulu in an article in the Quarterly Journal of the Andhra Historical Research Society (Vol. II). Mr. Mahalingam however thinks that the *Madhaviya* cannot be taken to represent the current practice of the day or to have been written for the practical guidance of the administrators of Vijayanagar—though he adds that we have little information as to the details of the machinery of judicial administration under the Vijayanagar kings. He says that the village assemblies seem to have begun to decay after the decline of the Chola Empire. The appointment of village officers (known as Ayyagars) by the government stifled the free life of the village republics. Extracts from Wilks' History of Mysore and from a report of Sir Thomas Munro describing the Ayyagar system will be found in Rice's " Mysore " (1897 Edition, pp. 574-576 and 580-581). The Ayyagars were the guardians of peace within their jurisdiction. One of them, the Gowd or Potel, was a kind of judge-magistrate. There was no regular gradation of courts of justice maintained by the king. Disputes, both civil and criminal were generally decided by the caste-men and the village elders and seldom reached the royal court. In the country side, they were mostly settled by popular Courts, caste-courts, guilds and religious heads.

Even temple authorities sometimes enquired into criminal cases which were also referred to arbitrators. On p. 125 of his book, Mr. Mahalingam refers to an inscription recording a trial for theft of temple jewels. During the trial, the accused ran away; his properties were sold in auction and the proceeds credited to the temple. In Nieuhoff's Voyages and Travels (extracts from which are translated and printed as Appendix C to Mr. Satyanatha Aiyar's History of the Nayak Kings of Madura) it is stated (referring to about 1664 A.D.) that each village had two judges who are much respected by the inhabitants. The context does not enable me to say who the judges referred to are.

The Vijayanagar kings called themselves protectors of *Varnasrama Dharma*; they were regarded as saviours of the ancient religion of the country against the Muslim invaders and many of their high officers were brahmins. The king had a council of ministers at whose head was the *Pradhani*; but, as usual, the working of the mechanism of government depended to a large extent on the personality of the ruler. The *Pradhani* was the Chief Judge. The king was the highest Court of appeal and when the lower Courts failed to do justice, the sufferer could appeal to the king. The king's purohit had by this time become merely the religious preceptor of the king and does not appear to have exercised any influence on the administration. The *Nadu* and the *Sabha* had been made responsible for the collection of the king's revenue in their respective jurisdictions; with the extension of the practice of assigning land

revenue in return for services and of farming out the revenues, the empire was becoming organised more and more on a feudal basis. Judicial fines formed part of the state revenues and the jagirdar, provincial ruler, revenue farmer or caste elder, who claimed the right of dispensing justice on behalf of the government paid a fixed contribution to the state and enjoyed the balance of the fine collected by him. The provincial governors seem to have held their own courts in their respective areas. Commissioners seem to have been appointed by the king from time to time to hear particular cases, but such appointments were often guided by motives of court favour. Nevertheless, Mr. Mahalingam states (p. 118) that in the regular courts the jury went into the merits and pronounced judgment. On p. 111, he quotes a Jesuit letter of 1665 referring to judicial administration at Madura. It complained that the *Pradhani* did not consider the case properly, that the governor, Judges and other great personages met in the palace, that the governor intimidated the witnesses, compelling them to depose according to his wishes and that the proceedings were sent to Madura from where the judgment came. This gives some idea as to what the normal procedure would have been.

In the administration of criminal justice, severe punishments seem to have been the rule and the law recognised differential treatment among the citizens. The police organisation was twofold, one maintained by the state and the other by the people. There was a special police force for the capital. Each village had a *Talayari*

remunerated by grants of land, paddy allowances, *kaval* fees, etc. Many of the *Palayagars* held their estates on Kaval or police tenure. It would appear from several inscriptions that 'trial by ordeal' was common in the Deccan.

(*vi*) THE MAHRATTA EMPIRE.—During historical times, the Maharashtra had been ruled over by the Chalukyas, Rashtrakutas, Silaharas and the Yadavas ; it is from the Yadava kings of Devagiri that the Muhomedans conquered the land of the Mahrattas. The Mahomedan rulers interfered very little with the local judicial institutions of the Hindus, but (as observed by Mr. Altekar) the general effect of the Mahomedan rule might have been to enfeeble the various forces which were spontaneously working in the village Community and thus arrest their development or satisfactory functioning. This probably accounts for the practical disappearance of the village council as a body by the beginning of the Mahratta period. Mr. Elphinstone (both in his history and in his report) has condemned in strong language the defects and imperfections of the judicial system under the Mahratta rule. " There was " he said " no regular administration of justice, no certain means of filing a suit and no fixed rule of proceeding after it had been filed. It rested with the officer of government applied to to receive a complaint or to neglect it altogether. The other occupations of these officers rendered it difficult for them to attend to judicial affairs. The Peshwa must have been nearly inaccessible to all men and entirely so to the poor." Mr. Sen (in his book on the Administrative system of the Mahrattas) has

combated the fairness of Mr. Elphinstone's criticism and he has in turn given a detailed account of judicial administration under Mahratta rule. The following summary has been made from his book. Chapter III of Mr. Altekar's book (V. C. W. I.) may also be consulted with advantage.

Under the Mahrattas also, the village remained an important unit in administration but the tendency of village offices to become hereditary and the growing practice of granting land for military services emphasised the feudal characteristics of the administration. Mr. Altekar is of the opinion that village councils of the Chola type did not exist in Western India in early times but he thinks that a regular village council was evolved in Western India by the beginning of the sixth century A.D. though not on the same lines as in South India (V.C.W.I. pp. 19-20). The administration of justice in the country-side during Shivaji's time seems to have been quite simple, almost primitive. Elaborate rules of procedure were unknown. The village elders met in the office of the Patel or in front of the village temple or under the shade of a sacred tree to hear disputes and administer common-sense justice. Even artizans were frequently summoned before the Panchayat to aid the judges with their knowledge of village history or tradition. When no evidence was available, divine aid was freely invoked. Criminal cases were heard in the first instance by the Patel.

Shivaji had a council of eight ministers (*Ashta Pradhans*) following ancient Hindu political theory. The *Nyayadhish* had jurisdiction over all

suits in the kingdom. He should try them righteously, finding out what is right and what is wrong. The *Nyayadhish* who was a brahmin was expected to be well-versed in the Sastras. There were the *Sabha Nayak* and the *Maha Prasnika* whose duty appears to have been to examine and cross-examine the parties; how they were appointed is not known. The whole council had to attend to hear appeals civil and criminal. The full court to hear appeals seems to have met more often in the days of Shivaji than during the Peshwa regime.

To begin with, the Peshwa was one of the *Ashta Pradhans* but Balaji Viswanath and Baji Rao made the office superior to the other seven and also hereditary in their family. The ruler was not only the political but also the ecclesiastical head of the state. It is in the exercise of this jurisdiction that the later Peshwas interfered in the social and religious affairs of the community. Such cases were generally referred to the Pandit Rao; but this brahmin officer had to obtain the non-brahmin raja's sanction to make the order legally complete. During the Peshwas' period, feudal barons like the Gaekwad, Holkar and Scindia exercised sovereign authority within their fiefs; even Saranjamdars claimed a similar right. All the time however, the village communities were allowed to administer their own affairs under the lax supervision of a set of government officers. Brahmin and non-brahmin alike served in the village *Panch*. The Patel acted as an intermediary between the villagers and the officers of the Peshwa. Before the officers, he was the representative of

the village and, in the village, he was the representative of the state. As a judicial officer, it was his duty to induce the parties to come to an amicable settlement or to appoint a Panchayat. As a police officer, he enquired into cases of theft and robbery and had under him the village watchman. His office was hereditary but he was not paid by the state. The villagers paid him in the form of a number of perquisites.

The Mamlatdars and the Kamavisdars were the Peshwa's representatives in the districts and their duties were of a comprehensive character. They had also to enquire into disputes both civil and criminal and appoint a Panchayat for decision. They entertained complaints against the village officers. In the administration of justice, legal exactitude was not the ideal. Amicable settlement was encouraged. While every suitor was given facilities for proving his case, consideration was shown even to the defeated party to ensure good-feeling between the parties. One of the Rajas declared that in case of settlement by arbitration, the parties will be exempted from the payment of *harki* (the five per cent or more which the successful litigant would have to pay if the case was referred to royal courts or the king's officers). When efforts at amicable settlement or arbitration failed, the parties had recourse to the regular instruments of justice, that is the Patel, the Mamlatdar, the Sar Subedar and the Peshwa. In towns, learned judges well-versed in the Sastras were appointed for judicial duties and were called *Nyayadhish*. They had nothing to do with executive duties.

The judgment of the Panchayat had to be confirmed by the Mamlatdar. If it was found to to be biassed or corrupt, the case would be sent to the Sirkar. Where the Patel refused to appoint a Panchayat or the parties could not have a Panchayat of thir own village, the case would be referred to the Mamlatdar to assemble a Panchayat. In important cases, the Panchayat will be directly appointed by the Mamlatdar. The order of the Panchayat, unless vetoed by the government, was enforced by the Mamlatdar who also placed at their disposal a peon for summoning the defendants and witnesses to their presence. A decision arrived at in the absence of either of the parties was not deemed valid and the absent party could appeal against it and have it quashed. Severe pressure was sometimes put upon the relatives of the absentee to make him appear in Court. An appeal against the decision of a Panchayat could be made only on the plea of corruption. If the appellant failed, he had to pay a fine. Both in appeal and in original suits, parties had to give security for abiding by the decision of the Court. For hearing appeals a fresh panchayat could be appointed or the Peshwa's minister or Mamlatdar might decide a case without a Panchayat. A Panchayat could not legally proceed to perform judicial proceedings unless authorised by the government, though any irregularity in this respect was sometimes waived by the authorities.

Apart from the *harki*, the suitors of the Mahratta Court were not required to pay any court-fee. In civil disputes, the parties were required to produce documentary as well as oral evidence according

to the nature of the case. They could however demand a decision by ordeal. As all judicial matters were conducted in the Peshwa's name, a *Nivad Patra* was given in his name to the winner, at the conclusion of a case. A true copy was kept in the Peshwa's Daftar.

In the administration of criminal law also, the authorities were the same as in civil cases ; but it does not appear that in criminal cases a Panchayat was as frequently resorted to as in civil cases. A false accuser was usually punished with fine. Murder and treason were punished with fine, confiscation of property and imprisonment. Government not only took the offender's income into consideration when fixing the amount of fine but also allowed him to pay the fine by instalments. In the days of Shahu and Balaji Baji Rao, capital punishment seems to have been unknown. The two Madhava Raos inflicted the death penalty and also mutilation. Murder was not only a crime but also a sin ; hence, a murderer even when pardoned had to perform the necessary penance according to Sastras.

The village police was under the Patel and the district police under the Mamlatdars. In cases of theft, the stolen property had to be recovered by the police or the offender traced to some other village. Otherwise, the police and the criminal classes of the village had to compensate the party robbed. If the offence be traced to another village, the inhabitants of that place would be liable to make compensation. In the big cities, the police were placed under the *Kotwal.*

Some account of judicial administration in Tanjore (in the later days of the Mahratta rule there) will be found in the Commission's Report of 1798 quoted on pp. 440 to 442 of Mr. Venkasami Rao's Manual of the Tanjore District. According to this report, arbitration appears to have been in great favour ; but official justice was being administered by a judge appointed by the ruler and the ruler himself was exercising appellate and revisional powers both over awards and over decisions of the Court. The salaries of the judge and other expenses of the judicial department were defrayed out of fines imposed on the losing party. Criminal justice was administered by the king who had power to institute enquiries into alleged offences. The police establishment consisted of a rural constabulary known as *Kavalgars* (mostly belonging to a class of free booters). They held *Manyams* (grants of land) and received contributions from the people and sometimes from the state. They also levied blackmail in addition. They were expected to produce all stolen property or make good its value. The efficiency and usefulness of the system seems to have varied from time to time, according to the authority of the government (see Venkasami Rao's Manual, pp. 445, etc.).

(*vii*) MYSORE.—A brief account of the administration of justice in Mysore, just before it came under British control may complete the story. Mr. Rice has been able to secure very little information as to the earlier methods of administering justice in that part of the country. On pages 604 to 606 of his book, he gives an account of how it was done during the regency of Purnaiya (1799 to 1810)

when the administration was substantially a native administration but with the advice and under the guidance of the British Resident. There was no separate department for the administration of justice, except for the Kazis in the principal towns; their duties however were limited to the adjustment of ecclesiastical matters among the Mahomedan inhabitants. Matters of the same nature as between Hindus were determined according to custom, if any, or by the doctrines of the Sastras. The *Amil* of each taluk superintended the department of police and determined minor complaints for personal wrongs. Three *Subadars* for the purpose of general superintendence had been appointed over the three provinces of the state ; they conducted the proceedings in all important cases, civil and criminal. On the apprehension of any accused person, the *Subadar* or the *Amil*, if he saw reason for holding a public trial, ordered a Panchayat to be assembled in which all respectable inhabitants unconnected with the parties had the right of sitting as Assessors. The proceedings of this commission were forwarded to the Dewan, accompanied by the report of the *Subadar* or the *Amil*. In ordinary cases, the Dewan pronounced his decision on an inspection of these proceedings. In matters of difficulty or matters affecting the life or liberty of the prisoner, the case was brought for final hearing before the Dewan who pronounced sentence (with the assistance of the Resident). The administration of civil justice was conducted in a similar manner. The *Amil* had power to hear and determine all cases of property disputes not exceeding five pagodas in value. Causes involving a larger amount

were heard and determined by a Panchayat. All respectable inhabitants were encouraged to attend as Assessors. In plain cases, the *Amil* confirmed the award. In cases of difficulty or difference of opinion, the proceedings were forwarded, with the report of the *Subadar* or the *Amil*, to the Dewan who pronounced the final judgment (in communication with the Resident) or if he thought fit, ordered a re-hearing before himself. In all cases, the parties had a right of appeal to the Dewan. The report quoted by Mr. Rice gives a brief account of how a suit was instituted and tried (see p. 606). This corresponds substantially to the procedure outlined in the Dharmasastras. The report however adds the following criticism : "It is a fixed rule of evidence in Mysore to suspect as false the testimony of every witness, until its truth is otherwise supported. It follows that the Panchayats are anxious for the examination of collateral facts, of matters of general notoriety and of all that enters into circumstantial evidence."

The foregoing story, meagre as it is, would seem to show that whenever, wherever and so far as circumstances permitted, attempts were all along being made in Hindu India to administer justice broadly on the lines indicated in the law books. The defects and deficiencies, sometimes serious, must have been the result of the geographical features and the political history of the country.

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